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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 970.

HORATIO N. WHITBECK, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED JULY 5, 1887.

of anything in the place of the groove (*d*), the question of "equivalents" is entirely out of the case.

SUMMING UP.

In view of the facts in this case, and of the law as we understand it, we claim :

1. That the appellant's device was anticipated by the Fiddes section, made in 1872; by the Colton Section, made in 1875; and by the blank described in Letters Patent 157,473, granted Louise Hutchins, December 4, 1874.

2. That there is no invention or novelty in bringing together, as a mere aggregation, the different features found in appellant's device.

3. That if the patent is sustained, it can be sustained for combination only, and the defendant is not liable, because only part of the combination is used—the longitudinal groove (*d*), being omitted in the appellee's manufacture.

Respectfully submitted,

M. D. LEGGETT,

JOSEPH A. OSBORNE,

Solicitors for Defendant.

By JOSEPH A. OSBORNE,

Of Counsel of Appellee.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 15, 1887.

1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, eastern division, held at the United States court-rooms, in the city of Cleveland, in the district aforesaid, before the Honorable Howell E. Jackson, circuit judge for the sixth circuit, and Honorable Martin Welker, district judge for the district aforesaid, on the eighth day of November, being a day of the October term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and in the one hundred and eleventh year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

2 Be it remembered that heretofore, to wit, on the 17th day of December, A. D. 1885, the following bill of complaint was filed in this cause in said court, being in the words and figures, viz:

Bill of Complaint.

In the Circuit Court of the United States within and for the Northern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,

vs.

HENRY N. WHITBECK, Treasurer of Cuyahoga County, O., Respondent.

Bill.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

Your orator, The Mercantile National Bank, of Cleveland, Ohio, respectfully represents that it is a national banking association incorporated under and by virtue of the act of Congress entitled "An act to provide for a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and the amendments thereof, and is established and doing business in the city of Cleveland, in said northern district of Ohio, and brings this its bill of complaint against Henry N. Whitbeck, treasurer of Cuyahoga county, Ohio, a resident of said city of Cleveland and a citizen of Ohio and

3 of said northern district, eastern division; and the grievance herein complained of arises and is exclusively founded on a violation by the defendant and others, whose unlawful acts he is carrying into effect, of rights of the shareholders of said national bank accorded them by section 5219 of the Revised Statutes of the United States, — secured to said shareholders a restriction upon the taxation of the shares of stock of said bank by State authority to that rate and limit assessed upon other moneyed capital in the hands of individual citizens of the State, as will herein fully appear.

And thereupon your orator complains and says that it has a capital stock of $1,000,000 dollars, divided into 10,000 shares of one hundred dollars each, all of which is paid up and certificates for the

shares outstanding and owned by a large number of persons, some of whom are non-residents of said State of Ohio and citizens of other States; that in accordance with section 2765 of the Revised Statutes of the State of Ohio, then in force, the cashier of your orators duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday in May, 1885, together with a full statement of names and residences of the stockholders therein, with the number of shares held by each and the par value of each share, as required by said section 2765; that included in said return so made by said cashier was the real estate owned by your orator at a valuation of $163,060.00, which was already valued and equalized in conjunction with all the other real estate in the city of Cleveland by the proper board of equalization at a taxable value of $163,060.00, which tax on said real estate so valued in said return at the sum of $163,060.00 being the sum paid by said bank therefor is otherwise and separately assessed and charged on the tax duplicate of said county, and paid by
4 this complainant to the treasurer of said county aside from the taxes set forth in this bill; that thereupon the said auditor pretended to proceed, as required by section 2766 of the Revised Statutes of Ohio, as amended March 9th, 1883, to fix the total value of such shares according to their true value in money, and fixed the same at $444,820.00, exclusive of the assessed value of its real estate, and made out and transmitted to the annual state board of equalization for incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as so fixed by said auditor; and your orator, from information and belief, alleges that the said county auditor, for the purpose of more accurately determining and fixing the value of said shares, did meet with and consult the board of equalization for the city of Cleveland, and the valuation by him reported to the State board of equalization was fixed and determined upon by said auditor, with the assistance and approval of said city board of equalization; that it is by law the duty of said city board of equalization to value and equalize for taxation all moneyed capital and personal property of every kind in the hands of individual citizens of the State of Ohio resident in said city, except only the capital, assets, and shares of incorporated banks, that being the only property under the statute aforesaid referred to said State board of equalization to be equalized; that said auditor placed a value upon said shares which was in fact and was known by him to be far in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State of Ohio and of said city and county; that the said State board of equalization, assuming and pretending to comply with the requirements of sections 2808 and 2809 of the said revised statutes as
5 amended March 9, 1883, did examine the returns aforesaid made by said cashier to said county auditor and the value of such shares as fixed by said county auditor; but that said State board of equalization did not examine, as required by law, any other returns made by said county auditor to the State auditor, and the

said board did then pretend to equalize said shares to their true value in money, and fixed the valuation thereof at $495,774.76, exclusive of the assessed value of its real estate; that said State board of equalization, so called, knowingly and designedly did fix a much higher per cent. of value and assessment for taxation upon the capital stock and shares of your orator than upon the capital and shares of other banks organized and existing under the laws of the State of Ohio, and which they pretended to equalize, a much higher rate and per cent. than was assessed upon other moneyed capital in the hands of citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in the said county of Cuyahoga and city of Cleveland; that about four-fifths of the taxes assessed in said city of Cleveland, and upon the stockholders of your orator upon their shares in the said bank, are assessed and paid for the purposes and use of the said city of Cleveland and about one-tenth for the purposes and use of the said county of Cuyahoga, and only about one-tenth for the purposes and use of the State of Ohio; that said State board of equalization did not equalize the value of said shares with the value of shares in other banks, or with the value of other moneyed capital in the hands of citizens of the State of Ohio, county and city, but designedly and intentionally placed a much higher value thereon, which valuation, so purposely equalized and determined by said State board of equalization, the auditor of said State did certify to the said auditor of Cuyahoga county, which valuation so certified the said county auditor
6 did enter upon the tax duplicate of said county for the year 1885.

That afterwards said county auditor did enter upon the tax duplicate of said county for the year 1885 against your orator a tax on such valuation of such shares for the year 1885, amounting in the aggregate to $12,890.15, and upon a valuation as aforesaid of such shares of $495,774.76, exclusive of the assessed value of its real estate.

That a large part of the capital stock of your orator is invested in the obligations and securities of the United States and in the lawful money thereof, and that said tax so levied and assessed was and is in violation of law, unauthorized, and void; that the said tax was levied on a valuation 11.455 per cent. higher than that fixed by the county auditor aforesaid, and about four-fifths thereof for the city of Cleveland, to answer the various purposes of that municipal body.

That said duplicate, as required by law, with the said taxes charged thereon, has been by said county auditor delivered to said Henry N. Whitbeck, treasurer of said county of Cuyahoga, to be by him collected from your orator by distraint, attachment, or other legal proceedings, as provided in said statutes, who will immediately proceed to enforce the collection thereof, either by the sacrifice of such shares by enforcing the lien thereon created by said statutes, or otherwise, unless restrained by the injunction of this honorable court.

And your orator further represents and shows unto your honors that in and by the second section of the twelfth article of the con-

stitution of said State it is provided that "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money," and
7 in and by the third section of the same article that "All property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals," and by the fourth section of the thirteenth article it is still further provided that "The property of corporations now existing or hereafter created shall forever be subject to taxation the same as the property of individuals;" and in and by the act of Congress under which your orator is incorporated the right of the State to tax any owner of its shares is made subject to this condition: "That the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State."

Your orator further avers that by section 2730 of the Revised Statutes of Ohio it is enacted that "the term of 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due to or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this State, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by such persons;" and by section 2736 of the Revised Statutes of Ohio it is provided that every person required to list property for taxation shall deliver to the assessor annually a statement of all personal property, moneys, "credits," and other property in his possession or under his control on the day preceding the second Monday of April of that year, which he is required to list for taxation; and by section 2737 it is provided that such statement, among other things, shall truly set forth the amount of
8 "credits" possessed by such person, as that term is by the above-recited statute defined.

Your orator says that a large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is by the aforesaid provision allowing deduction of legal *bona fide* debts to be made therefrom expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares as to which no exemption or deduction is provided for by the laws of the State, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States.

Your orator further avers that the following-named stockholders of said bank were on the said day next preceding the second Monday of April, A. D. 1885, the owners and thence till now have owned, and still continue to own, the number of shares of the stock of said bank set opposite their respective names, viz.:

T. P. Handy	600
S. Chamberlain	500
R. L. Chamberlain	100

W. Bingham	150
S. L. Mather	400
Jas. Barnett	400
Amos Townsend	240
L. A. Murfry	50
C. L. Murfry	50
E. R. Perkins	530
James Carmeln	70

And at the day last named and at the time the cashier of said banking association made return to the auditor of Cuyahoga
9 county, Ohio, of the names and residences of the shareholders of said association, with the numbers and par value of the shares of the capital stock of said banking association for the year 1885, to wit, between the first and second Mondays of May of said year, each of said above-named shareholders was indebted and owning to others of legal *bona fide* debts a sum in excess of the credits, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, except said E. R. Perkins and said C. L. Murfry, the excess of whose debts over the credits, which, by the laws of Ohio, they were entitled to deduct from their credits, equaled in the case of said Perkins the value of 320 of his said shares, and in the case of said Murfry the value of 25 of his said shares, which said excess of said debts over credits as aforesaid should be deducted from the assessed value of said shares so owned by him, and by reason of the facts above stated said shares of said stock should not have been placed on the tax duplicate, and no tax should have been assessed thereon. And your orator alleges that neither of the above-named shareholders listed any of said shares for taxation nor did either authorize any one to list them for him.

That at the time of the return and statement to the auditor of Cuyahoga county, as above stated, neither said bank nor said cashier had knowledge of the fact that the shareholders above-named were indebted as aforesaid, and no opportunity was given them or either of them, nor was any provision therefore made by law to deduct from the value of said shares so owned by them the amount of said indebtedness or to demand the right so to do or demand that the same should be done, but your orator alleges that on the 17th day of December, A. D. 1885, and before the tax assessed on said shares became due and payable, each of said shareholders and your
10 orator made due and legal showing and proof to said auditor of said Cuyahoga county to whom said return was made and to said respondent of the existence of said indebtedness and demanded that the same should be deducted from the assessed value of the shares owned by him and returned by your orator, but both the respondent and said auditor refused to make said deductions, and insisted that the whole of said shares, as then assessed, should remain upon the tax duplicate, and insisted upon the payment of the whole of the tax as assessed thereon.

And your orator insists that by reason of the premises above set forth there should be deducted from the shares of the capital stock

owned by said shareholders above-named and now standing on the tax duplicate of said county, $285,500 par value of the shares of said stock; in all, the sum of $141,543.48, according to the assessed value thereof.

And your orator further represents that on the 17th day of December, A. D. 1885, on behalf of the shareholders owning such shares, it duly tendered to said treasurer and offered to pay for the taxes due Dec. 20, 1885, on said shares the sum of $3,942.59, and is still ready and willing to pay the same, as well as the other half, on the same basis of valuation, in manner and at the times provided by law for the payment of taxes, to wit, on or before the 10th of June, A. D. 1886, if the treasurer will receive it or the court so order; but said treasurer has so far refused to receive said payment unless your orator would also pay the whole amount of said tax as it stands on the duplicate.

Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust,
11 illegal, and void for the following, among other, reasons, to wit:

First. That said tax is levied and assessed against your orator directly and is in violatien of the act of Congress under which your orator is incorporated.

Second. That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him and requires him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the State, and that under the laws of the same State the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him and not simply the excess of the value of said shares over his indebtedness, and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio.

Third. Their property in this corporation is not valued and taxed the same as the property of individuals, and the burden of taxation upon it is very much greater; nor has any equality been preserved in the valuation of the shares for taxation as compared with other property in the locality where your orator is established; on the contrary, the valuation, in proportion to the value, is fully twice as much as that fixed upon other property, while the rate of levy is the same.

Fourth. The proceedings of said State board of equalization were irregular, illegal, and of no binding obligation, for, while the said act proposes to give authority to examine and equalize the value of such shares as fixed by the county auditor and as reported by him to the State auditor, yet the said board did, in fact, examine and equalize as aforesaid and not otherwise the value of such
12 shares fixed by the county auditor and returned by him to the State board of equalization, which values so fixed and returned the said State board were not authorized by law to examine, equalize, or in any manner meddle with. While said act proposes

to give authority to hear complaints and to equalize the value of shares as fixed by the county auditors, not increasing the aggregate more than 20 per cent. of such valuation, yet your orator avers that said board has proceeded, without any complaint made against the valuation made by said auditor, and without any notice to your orator or the other national banks located in said city and county or the shareholders thereof, to increase arbitrarily the valuation for taxation more than five hundred thousand dollars upon your orator and upon other national banks of the said city and upon the shareholders thereof without any hearing or any opportunity for hearing, as is fairly required by said act.

Fifth. That the taxation of the shares of your orator's stock as aforesaid is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio.

Sixth. The necessary effect of the proceedings had in the assessment and levy of the taxes standing against your orator and the shares thereof owned by its said shareholders has been to deprive your orator and such shareholders, both in the matter of valuation and equalization, of all benefit of the constitution and general laws of the State, by which only uniformity in the burdens of taxation upon all description of property could be secured, to take from them the security afforded by the limitations of the acts of Congress, and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively valueless.

13 And your orator further represents that if the shares of said stockholders are permitted to be sold under the lien created on them by section 2839 of the said Revised Statutes of Ohio or otherwise irreparable injury would not only be done to each of the shareholders, but also to your orator, and it would thereby be subjected to great loss of standing and credit and other injuries, for the redress of which the law affords no remedies, and the franchises with which your orator is invested by the act of Congress as aforesaid would not only be greatly impaired in value, but if such illegal exactions are to continue and be persisted in would be rendered nearly useless; that the disability imposed upon your orator to make transfers or pay dividends of or upon shares upon which such illegal tax remained unpaid would damage all the ordinary business of your orator and introduce confusion and uncertainty into its transactions and the consequent loss of public confidence, upon which its success depends; or, if your orator should pay such illegal tax and attempt to deduct the amount from dividends or other funds of the shareholders in its hands, which many of its shareholders have already prohibited its doing, it would be subjected to a great multiplicity of suits brought by its separate shareholders for so doing, and in any event a great number of suits would be rendered necessary to adjust the rights of all the parties, and your orator would be subjected to great expense and irreparable injury thereby.

Inasmuch, therefore, as your orator is remediless by the strict rules of the common law and relievable only in equity, it prays that said Henry N. Whitbeck, treasurer of said Cuyahoga county, may be made party defendant to this bill of complaint; that the writ of

subpœna may issue against him, and that he may answer the premises.

14 That your honors will grant unto your orator your writ of injunction strictly restraining and enjoining, during the pendency of this suit, the said Henry N. Whitbeck, treasurer of the said Cuyahoga county, as aforesaid, from collecting or attempting to collect from your orator or said individual stockholders, by distraint or otherwise, any of the said taxes as the same stand charged on said duplicate, and that upon the final hereing hereof the said tax may be declared and decreed wholly illegal and void; or, if your honors shall consider your orator not entitled to the relief aforesaid, that the said respondent may be decreed to receive in full of said taxes the sum so tendered by your orator and be perpetually enjoined from collecting or attempting to collect the balance of said taxes so illegally assessed, and for such other and further relief in the premises as equity and good conscience require.

BOYNTON AND HALE,
Solicitors for Complainant.

UNITED STATES OF AMERICA, *Northern District of Ohio:*

Be it remembered that on this 17th day of December, 1885, personally came before me C. L. Murfey, who, being by me duly sworn, deposes and says that he is the cashier of the complainant in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements therein contained as derived from the information of others he believes to be true, and all other allegations and statements therein made are true in substance and in fact.

C. L. MURFEY, *C'r.*

Sworn to before me and signed in my presence this 17 day of Dec., 1885.

NORTON T. HORR, [SEAL.]
Notary Public in & for Cuyahoga County, State of Ohio.

15 And afterwards, to wit, on the 18th day of December, A. D. 1885, the following subpœna was filed in this cause in said court, viz:

Subpœna.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, Eastern Division, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Henry N. Whitbeck, treasurer of Cuyahoga county, Ohio, if he may be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in the said court against him by the Mercantile National

Bank of Cleveland, Ohio. Hereof he is not to fail under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 17th day of December, A. D. 1885, and in the 110th year of the Independence of the United States of America.

A. J. RICKS, *Clerk*,
[SEAL.] By O. C. BEATTY,
Deputy Clerk.

Memorandum.

The said defendant is required to enter his appearance in this suit in the clerk's office of said court on or before the first Monday of February, 1886; otherwise the said bill may be taken *pro confesso*.

A. J. RICKS, *Clerk.*

16 *Marshal's Return.*

NORTHERN DISTRICT OF OHIO, *ss:*

On the 18th day of December, 1885, I made due service of this writ by delivering a true and duly certified copy thereof to H. N. Whitbeck, treasurer of Cuyahoga county, Ohio.

W. F. GOODSPEED,
U. S. Marshal.

(Endorsed:) Subpœna. Returnable Feb'y 1st, 1886. Rule day for appearance, Feb'y 1st, 1886. Rule day for answer, March 1st, 1886. Returned and filed Dec. 18th, 1885. A. J. Ricks, clerk.

And afterwards, to wit, on Thursday, the 17th day of December, being a day of the October term, A. D. 1885, of said court—present, the Honorable Martin Welker, district judge—the following proceedings were had in this cause in said court, viz:

Restraining Order.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
vs.
HENRY N. WHITBECK, Treasurer of Cuyahoga County, O
} Chancery No. 4411.

This day came the complainant, and came also the defendant, by counsel, and the motion for an injunction, as prayed for, came on for hearing, and the court, being fully advised in the premises, do order that the defendant be, and he is hereby, enjoined and restrained, prior to the final hearing and further order of this court in the premises, from collecting the excessive taxes and assessments complained of in the complainant's bill, by distraint or otherwise, and from serving notice as such treasurer forbidding the officers of said bank from making transfer of the shares or payment of dividends or other funds belonging to said shareholders.

17 It is further ordered that said complainant pay to said defendant, as treasurer, the amount of taxes admitted by said

bill to be due, if said treasurer will receive the same; and in case said treasurer receives the same his receipt therefor shall be without prejudice to his right to contest the invalidity of the taxes in dispute in said case.

It is further ordered that said complainant file herein its bond in the sum of $2,000.00, with surety approved by the clerk of said court, conditioned according to law, to indemnify the defendant for any damage that may be awarded by the court in the premises against said complainant.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 18th day of December, 1885, I made due service of this writ by delivering a true and duly certified copy thereof to H. N. Whitbeck, treasurer of Cuyahoga county, Ohio.

W. F. GOODSPEED,
U. S. Marshal.

And afterwards, to wit, on the — day of ——, A. D. 188–, the following bond was filed in this cause in said court, being in the words and figures, to wit:

(NOTE BY CLERK SUP. CT. U. S.—Page 18 (supposed to be bond above referred to) missing from transcript.)

19 And afterwards, to wit, on Thursday, the 30th day of December, A. D. 185–, being a day of the October term, A. D. 1885, of said court, the following order was entered in this cause in said court, viz:

Order.

It being shown to the court that the first name of said defendant is Horatio and not Henry, on motion of said plaintiff it is ordered that the name Henry, wherever it appears in the pleadings, process, or return thereof, or orders in said case be changed to Horatio, and that hereafter said cause proceed against said respondent as Horatio N. Whitbeck instead of Henry N. Whitbeck.

An- afterwards, to wit, on Monday, the 15th day of March, being a day of the February term, A. D. 1886, of said court, the following proceedings were had in this cause in said court, viz:

Leave to File Demurrer.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, O.,

vs.

HORATIO N. WHITBECK, Treasurer, &c.

In this cause leave is given the respondent to file a demurrer to complainant's bill instanter.

And afterwards, to wit, on the 15th Day of March, A. D. 1886, the following demurrer was filed in this cause in said court, viz:

Demurrer.

In the Circuit Court of the United States within and for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,

vs.

HORATIO N. WHITBECK, Treasurer of Cuyahoga County, O., Defendant.

The demurrer of Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, defendant, to the bill of complaint of the Mercantile National Bank of Cleveland, Ohio, complainant.

To the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

This defendant, not confessing or acknowledging all or any of the matters and things in this said bill of complaint to be true, demurs thereto, and for cause of demurrer says—

1. That this court ought not to take cognizance of or sustain the action aforesaid, because he says that said court has no jurisdiction thereof, as it appears from said bill of complaint that said complainant is established and doing business in the city of Cleveland, in the county of Cuyahoga and State of Ohio.

2. And for further cause of demurrer he says that it appears by the complainant's own showing in its said bill of complaint that the said complainant is not entitled to the relief prayed for in its said bill against this defendant, and that the facts set forth in said bill of complaint do not make such a case as entitles said complainant to any relief whatever against the defendant.

Wherefore, and for divers other causes of demurrer appearing in the said bill of complaint, this defendant demurs to said bill and to all matters and things therein contained, and prays the judg-
21 ment of the court whether he shall be compelled to make any further or other answer to the said bill; and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

We certify that in our opinion the foregoing demurrer of Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, defendant, to the bill of complaint of the Mercantile National Bank, of Cleveland, Ohio, complainant, is well founded in law and proper to be filed in the above cause.

HADDEN, DISSETTE AND COLLISTER,
JAMES LAWRENCE,
CLARENCE BROWN,
Solicitors for Respondents.

UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Eastern Division, }

Horatio N. Whitbeck, being duly sworn, deposes and says that he has read the forgoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

H. N. WHITBECK.

Sworn to before me by the said Horatio N. Whitbeck and by him signed in my presence this 15th day of March, 1886.

[SEAL.] A. E. SHEARS,
Deputy Clerk, Common Pleas Court, Cuyahoga County, Ohio.

And afterwards, to wit, on Thursday, the 25th day of March, being a day of the February term, A. D. 1886, of said court, the following proceedings were had in this cause in said court, viz:

Order Overruling Demurrer.

THE MERCANTILE NAT'L B'K OF CLEVELAND, O.,
vs.
HORATIO N. WHITBECK, Treasurer, &c.

22 This cause came on this day to be heard upon the demurrer of Horatio N. Whitbeck, treasurer, to the complainant's bill of complaint herein, and the same was argued by counsel, and thereupon, on consideration thereof, it is ordered that the same be overruled, and leave is given the respondent to file his answer by April 15th, 1886.

And afterwards, to wit, on the 22nd day of April, A. D. 1886, the following answer was filed in this cause in said court, viz:

Answer of H. N. Whitbeck.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, Complainant,
vs.
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, O., Defendant.

Answer.

The answer of Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, defendant, to the bill of complaint of the Mercantile National Bank of Cleveland, Ohio, complainant.

To the judges of the circuit court of the United States for the northern district of Ohio, eastern division:

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto, admits that he is the

treasurer of Cuyahoga county, Ohio, and is a citizen of Ohio and of said northern district, eastern division; that said complain-
23 ant is a national banking association incorporated under the act of Congress mentioned in said complaint, with the amendments thereto, and is established and doing business in the city of Cleveland, in said northern district of Ohio; that said complainant has a capital stock of $1,000,000.00, divided into 10,000 shares of one hundred dollars each, all of which is paid up and certificates for the shares are outstanding; that the cashier of said complainant reported in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday in May, 1885, together with a statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share, as required by section 2765 of the Revised Statutes of Ohio; that the real estate included in said return is otherwise and separately assessed and charged on the tax duplicate of said county; that the auditor of said county thereupon proceeded to fix the total value of the shares of said bank at $444,820.00, exclusive of the assessed value of its real estate, and made out and transmitted to the annual State board for the equalization of the shares of incorporated banks a copy of the report as made by said cashier, together with the valuation of such shares as so fixed by said county auditor; that the said State board of equalization did examine the return aforesaid made by said cashier to said county auditor and the value of such shares as fixed by said county auditor, and the said board (having proceeded in all respects according to law) fixed the aggregate valuation of the shares of said complainant at $495,774.76, exclusive of the assessed value of its real estate; that the auditor of said State did thereupon certify to the auditor of said county
24 the valuation of the shares of said complainant as equalized and determined by said State board of equalization, which valuation the county auditor did enter upon the tax duplicate of said county for the year 1885, and did also enter upon the tax duplicate for the year 1885 a tax on such valuation of such shares for said year, amounting in the aggregate to $12,890.14, and upon a valuation, as aforesaid, of such shares of $495,774.76, exclusive of the assessed value of its real estate, and that afterwards the said duplicate, as required by law, with the said taxes charged thereon, was by said county auditor delivered to the said Horatio N. Whitbeck, treasurer of said county, to be by him collected.

This defendant also admits that, as said tax duplicate for the year 1885 was originally made up by said county auditor and delivered to said county treasurer, the said tax levied on the total valuation of the shares of said bank, exclusive of the valuation of said real estate, was entered against the name of said complainant without specifying therein the names of the several shareholders or the tax assessed on the shares held by each, but giving the separate valuation of each of said shares, exclusive of real estate, as fixed by said State board of equalization.

He said that said tax was so entered against the name of said complainant because for many years the said complainant, in common with the other banks located in said county, had uniformly paid the taxes chargeable against the shares of its stockholders and it was agreed and understood between said bank and said county auditor that it would continue to pay the same.

This defendant does not admit that said duplicate, as so made up and delivered, was in any respect insufficient or illegal, but, in order to avoid all possible ground for complaint, the said county
25 auditor, since the commencement of this action has corrected the said duplicate, as he is authorized to do by the laws of Ohio, by duly entering thereon the names of the several shareholders of said complainant, the number and valuation of the shares held by each, and the amount of taxes chargeable thereon.

And this defendant disclaims any purpose of enforcing the collection of said taxes in any other manner than as authorized by law.

And, further answering the said bill of complaint, this defendant denies that he or any others whose acts he is carrying into effect is violating or has violated any rights of the shareholders of said complainant, either in respect to the taxation of their shares of stock in said bank or otherwise.

He denies that the said auditor of Cuyahoga county did meet with or consult with the board of equalization for the city of Cleveland for the purpose of more accurately determining and fixing the value of said shares, or that the valuation by said county auditor reported to the State board of equalization was fixed and determined upon by said county auditor with the assistance and approval of said city board of equalization, or that it is by law the duty of said city board of equalization to value and equalize for taxation all moneyed capital and personal property of every kind in the hands of individual citizens of the State of Ohio resident in said city, except only the capital, assets, and shares of incorporated banks.

He denies that said county auditor placed a value upon said shares which was in fact or was known by him to be in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State of Ohio and of said city and county.

He denies that said State board of equalization did not examine any other returns made by said county auditor to said State auditor except the return made by the cashier of said complainant
26 to said county auditor, and the value of such shares as fixed by said county auditor, or that said State board of equalization knowingly or designedly did fix a higher per cent. of value and assessment for taxation upon the capital stock and shares of said complainant than upon the capital and shares of other banks organized and existing under the laws of the State of Ohio, or a higher rate per cent. than was assessed upon other moneyed capital in the hands of citizens of the State of Ohio, or higher than that fixed on other moneyed capital in the hands of such citizens in the said county of Cuyahoga and city of Cleveland.

He denies that said State board of equalization did not equalize the value of said shares with the value of other moneyed capital in the hands of citizens of the State of Ohio, county and city aforesaid, or that said State board of equalization designedly or intentionally placed a higher valuation thereon, or that the tax levied and assessed in the valuation of said shares was or is in violation of law, unauthorized, or void.

Said defendant further denies that the levying and assessing of said tax against said complainant directly is in violation of the act of Congress of the United States under which said complain-t is incorporated. He denies that the tax, the collection of which said complainant, by its said bill, seeks to enjoin, is in violation of any act of Congress of the United States or is levied or assessed in a manner which is in violation of any act of Congress of the United States.

He denies that the shares of the capital stock of said complainant, the property of its shareholders, are not taxed by any law prescribing any uniform rule for the valuation of the property of said shareholders and the levying of taxes thereon as provided by the constitution of the State of Ohio. He denies that the acts of the General Assembly of the State of Ohio under and by virtue of which the taxes in said State are or purport to be assessed do not have
27 a uniform operation throughout said State, as required by the constitution of said State.

He denies that the property of the owners and holders of the shares of the capital stock of said complainant in said complainant corporation is not valued and taxed the same as the property of individuals, or that the burden of taxation upon the shares of said stockholders in said corporation is very much or any greater than upon the property of individuals.

He denies that equality has not been preserved in the valuation of said shares for taxation as compared with other property in the locality where said complainant is established.

He denies that the valuation of said shares, in proportion to the value thereof, is fully twice as much as or any more than the valuation fixed upon other property.

While admitting that the constitution and laws of Ohio contain provisions in reference to taxation substantially as quoted in said bill of complaint, this defendant says that all the provisions of said constitution and laws upon that subject should be considered in order to determine the force and effect of those quoted, and he denies that a large amount of moneyed capital in the hands of individuals invested in promissory notes and other obligations and credits is expressly exempted from taxation in said State.

He denies that any of the shareholders of said banking association, at the times named in said bill of complaint, was indebted or owing to others of *bona fide* debts a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of his said shares or any part thereof.

He denies that either of said shareholders was then indebted in any sum whatever, or that, even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares
28 of stock should not have been placed on the tax duplicate and no tax assessed thereon.

This defendant denies the averment in said petition that neither of said shareholders authorized any one to list his said shares for him.

He denies that it was necessary for said shareholders so to do.

He denies that, at the time of the return and statement by the cashier of said banking association to the auditor of Cuyahoga county, neither said bank nor its cashier had knowledge of the indebtedness of said shareholders, if any such indebtedness existed.

He denies that, on the 17th day of December, 1885, or at any time, said complainant or any of said shareholders made due and legal showing and proof to the auditor of said county or to this defendant of the existence of said alleged indebtedness, or demanded that the same should be deducted from the assessed value of the shares owned by such shareholders and returned by said complainant.

He denies that any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint.

This defendant further denies that the taxes so levied and assessed on the shares of said complainant's stock are, for the reasons alleged in said bill of complaint or for any reason, unjust, illegal, or void.

He denies that the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, or that such is the uniform practice throughout the State.

He denies that the proceedings of said State board of equalization were in any respect illegal or irregular, or were for any reason of no binding obligation, or that said State board of equalization proceeded arbitrarily to increase the valuations for taxation upon said complainant and upon other national banks of the said city and upon the shareholders thereof without any opportunity for hearing.

29 He denies that the taxation of the shares of said complainant's stock is at a much or any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of said State of Ohio. He denies that the necessary effect of the proceedings had in the assessment and levy of the taxes standing against said complainant and the shares thereof owned by its said shareholders has been to deprive said complainant or said shareholders either in the matter of valuation or equalization of any of the benefits of the constitution or general laws of said State of Ohio, or to take from complainant or said shareholders any security afforded them by the limitation of said act of Congress, or to impose upon said complainant or said shareholders any undue or excessive exactions or any such exactions as to make the franchises granted by said act of Congress comparatively valueless.

He denies that irreparable injury would be done either to complainant or to its said shareholders or any of them by the enforcement of the lien created on said shares by section 2839 of the Revised Statutes of Ohio, or that said complainant would thereby be subjected to great loss of standing or credit, or subjected to any other injuries for the redress of which the law affords no remedies, or that the franchises of said complainant granted by said act of Congress would be greatly impaired or rendered nearly useless, or that the disability imposed upon complainant to make transfers or pay dividends of or upon said shares upon which said tax remains unpaid would damage all the ordinary business of complainant or introduce confusion or uncertainty into its transactions or incur any loss of public confidence, or that if said complainant should pay the taxes for those of its shareholders whom by law it may pay for and deduct the amount from their dividends or other funds of said shareholders in its hands it would be subjected legally to any suits which
30 might be brought against it by said shareholders or any of them for so doing, or that said complainant would be subjected to great expense or irreparable injury by so doing, or that a great number of suits would be rendered necessary to adjust the rights of all the parties.

And this defendant further denies each and every allegation in said bill of complaint no- hereinto*fore* admitted or expressly denied.

To the contrary of all which this defendant avers that by and under the act of Congress of the United States in said bill mentioned the shares of stock of said complainant are personal property, and in and by said act it is permitted that the Legislature of each State might determine and direct the manner and place of taxing all the shares of the national banking associations organized and established thereunder located within such State, subject only to two restrictions, viz:

1st. That the taxation thereon should not be at a greater rate than should be assessed upon other moneyed capital in the hands of individual citizens of such State; and,

2nd. That the shares owned by any non-resident of the State should be taxed in the city or town in which such association should be located and established.

And this defendant says that the tax mentioned in said complainant's bill assessed upon the shares of said complainant is not taxed at a greater rate than is imposed by the State of Ohio and the laws thereof upon other moneyed capital in the hands of the individual citizens of said State and individual citizens of said county and city of said State, and that the shares of the non-resident shareholders are taxed in said city of Cleveland, where said complainant's bank is established.

And this defendant further says that said annual State board for the equalization of the shares of incorporated banks, consist-
31 ing of the Governor, auditor of State, and attorney general of said State, did meet on the third Tuesday in June, A. D. 1885, at the office of said auditor of State, at Columbus, and, having

before them the statements and returns of the complainant's cashier and the valuation of complainant's shares fixed by said county auditor, with like returns and valuations of all the incorporated banks within the State of Ohio, proceeded to consider the same, and, having heard all complaints, equalized the valuation of the shares of all the incorporated banks within said State as determined upon and reported by the county auditors to said board and to said auditor of State, and thereupon made an equalization of the valuation of all the shares of all the incorporated banks within the State of Ohio, according to the rules prescribed by the laws of the State for valuing and equalizing the values of real and personal property.

That in acting upon the shares of said complainant for the purpose of equalizing their value for taxation aforesaid said annual State board of equalization was governed by the same rules and adopted and used the same methods as those by which it was governed and which it used in equalizing the shares of all other incorporated banks for taxation and the same as governed and were used by all other equalizing boards and all other officers of said State, county, and city in the valuing and equalizing of all other property for taxation; that neither the said complainant or its cashier or other officers nor any of its shareholders appeared before said board or presented to it any complaints or any statement of the several alleged matters and things now set forth in said bill of complaint.

That, it appearing from said cashier's return that the capital stock of complainant taken together with its surplus and undivided profits amounted to $1,042,730.41, and that said county
32 auditor acting upon said return, had fixed the value of all the shares of the said complainant for taxation at $444,820.00 (after having deducted from said value the value of said real estate), said annual State board of equalization, governed by the rules and adopting and using the methods aforesaid and acting wholly within the limits and discretion allowed them by the statutes of said State, increased said valuation so as aforesaid fixed by said county auditor by adding thereto $50,954.76, making said valuation of all of said shares $495,774.76 and each of said shares thereof (the par value of which is $100) $49,574, which sum is not in excess of the true value in money of said shares, but, on the contrary, is much less than the true value in money thereof.

And said board having equalized and fixed the valuation of said shares of complainant, the said auditor of State thereupon transmitted to the auditor of said Cuyahoga county the valuation of the shares of said complainant so as aforesaid determined and fixed by said State board; and the said county auditor of said Cuyahoga county thereupon, as he was required by law, did place upon the duplicate of said county, with all the other taxable property in said county, the said shares of said complainant at the valuation so fixed upon and determined by said State board of equalization and assessed upon the same merely the same rate as was assessed upon all other property upon the county duplicate in the city of Cleveland for the said year of 1885 at the place where said complainant is located and doing business and being the same rate as that assessed

on the moneyed capital of the individual citizens of said State resident in said city of Cleveland; and this is the same tax mentioned and described in the complainant's bill.

And this defendant further says that under the laws of Ohio he, as the treasurer of said county, has no duty or authority in re-
33 spect to the assessment or appraisement of property for taxation; that the auditor of said county has no further duty or authority in respect to the assessment or appraisement for taxation of the shares of incorporated banks after he has fixed the total value of such shares and has made out and transmitted to the annual State board for the equalization of the shares of incorporated banks a copy of the report made by the cashiers of the several banks, together with the valuation of such shares as fixed by said auditor in pursuance of section 2766 of the Revised Statutes of Ohio; that if the shareholders of said complainant were entitled to any deduction from the value of their said shares on account of their individual indebtedness (which this defendant does not admit) due showing and demand therefor should have been made to said auditor of said county before he fixed the value of said shares and transmitted the same to the auditor of State as aforesaid, but that no such showing or demand was made to said county auditor, nor was any showing or demand or any complaint in respect thereto made to the said State board of equalization.

Defendant says that at the time when said complainant claims that its said shareholders made demand for the deduction of their alleged indebtedness from the valuation of their said shares the entire process of the appraisement and equalization of the valuation of such shares had long since been completed, and neither this defendant nor said county auditor had then authority to allow any deduction whatever from the valuation of said shares, as the same had been fixed and determined.

And the said defendant, further answering, denies that the said complainant is entitled to the relief or any part thereof in the said complaint demanded; and he prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

(Signed) HADDEN, DISSETTE AND COLLISTER,
34 JAMES LAWRENCE,
CLARENCE BROWN,
Solicitors for Def't.

UNITED STATES OF AMERICA, }
Northern District of Ohio, } ss:

H. N. Whitbeck, being duly sworn, deposes and says that he is the defendant in the foregoing answer; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein contained on information and belief, and as to such matters he verily believes them to be true.

H. N. WHITBECK.

Sworn to before me by the said H. N. Whitbeck and by him subscribed in my presence this 21st day of April, A. D. 1886.

[SEAL.] L. E. MEACHAM,
Deputy Clerk Common Pleas Court, Cuyahoga County, Ohio.

And afterwards, to wit, on the 3rd day of May, A. D. 1886, the following replication was filed in this cause in said court, viz:

Replication.

Circuit Court of the United States, Northern District of Ohio. In Equity.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* HORATIO N. WHITBECK, Treasurer, etc. } No. 4411.

The replication of the above-named complainant to the answer of the above-named defendant.

The repliant, saving and reserving to itself now and at all
35 times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto, says that it will aver, maintain, and prove the bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that — or any other matter or thing whatsoever in the said answer contained material and effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by the said bill it has already prayed.

BOYNTON AND HALE,
Solicitors for Complainant.

And afterwards, to wit, on Saturday, the 6th day of November, being a day of the October term, A. D. 1886, of said court, the following order was filed in this cause in said court, viz:

Order Appointing Master.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, O.
vs.
HORATIO N. WHITBECK, Treas., &c.

In this cause it is ordered that A. J. Ricks, because of his experience in matters of accounting, be appointed a special master to examine the evidence and record now on file, and report who, if any,
of the shareholders of the complainant on the day preceding
36 the second Monday of October, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares.

And afterwards, to wit, on the 5th day of November, A. D. 1886, the following affidavit was filed in this cause in said court, viz:

Affidavit of T. P. Handy.

STATE OF OHIO, *Cuyahoga County,* } ss:

Affidavit.

T. P. Handy, being first duly sworn, on his oath says that the Mercantile National Bank is a corporation organized and doing business at Cleveland, Ohio, under the act of Congress known as "the national bank act," and the acts amendatory thereto, and it and its stockholders are subject to the provisions of and entitled to the benefits conferred by section 5219 of the Revised Statutes of the United States; that on the day next preceding the second Monday of April, A. D. 1885, and at the time the cashier of said bank made out and returned to the auditor of Cuyahoga county, Ohio, a statement of the names and residences of the stockholders of said bank, with the number of shares of the capital stock owned and held by each, and the par value thereof for the year 1885, to wit, between the first and second Mondays of May, A. D. 1885, as required by section 2765 of the Revised Statutes of Ohio, affiant was an owner of 600 of said shares of the par value of $100 per share, and the same were returned as belonging to him by said cashier, and from said day next preceding the second Monday of April, 1885, he has continued to own and now owns said number of shares of stock in said bank. Affiant further says that he has never been required by any authority to list said shares for taxation; that when the same were required to be and
37 were so returned for taxation by said cashier, and also on the day next preceding the second Monday of April, 1885, affiant was indebted and owing to others in legal *bona fide* debts the sum of $80,000 over and above any and all credits which by law he was entitled to deduct therefrom, and from which excess of debts over credits should be deducted said 600 shares of said stock. Affiant says that in making up the sum of said debts owing by him in excess of the credits deducted therefrom he has not included any claim or obligation which section 2730 of the Revised Statutes of Ohio requires to be rejected, which he is ready to make appear if required or permitted by an exhibit of such indebtedness.

Affiant further says that the tax and assessment upon said shares were made thereon in excess of the amount for which the same were assessable without his authority or consent, and the same were listed by said cashier in the manner aforesaid without any authority from the affiant for so doing, and in sole compliance with the statute, and affiant has had no opportunity or way provided to secure said deduction of credits from said shares other than to seek said deduction from the value of the shares since they were carried on the duplicate.

T. P. HANDY.

Sworn to before me and in my presence subscribed this 16th day of December, A. D. 1885.

NORTON T. HORR,
Notary Public.

38 And afterwards, to wit, on the 8th day of November, A. D. 1886, the following report was filed in this cause in said court, viz:

Report of Special Master.

In the Circuit Court of the United States, Northern District of Ohio Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
vs.
H. N. WHITBECK, Treasurer. } Equity No. —.

To the honorable the judges of the circuit court:

By an order entered in this case the undersigned was appointed a special master to ascertain and report from the testimony and record who, if any, of the shareholders of the complainant on the day preceding the second Monday of April, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares of the capital stock of complainant bank.

The master reports that, having examined the evidence and heard the claims of counsel, he finds and reports that all the shareholders are entitled to the deductions as charged in the bill, except the following, who should be taxed for the amount stated, viz:

E. R. Perkins has credits, subject to taxation, above his indebtedness on the day named to the sum of $4,374.40.

39 C. L. Murphy has credits, subject to taxation, above his indebtedness on the day named to the sum of $724.00.

Robert L. Chamberlain has credits, subject to taxation, above his indebtedness on the day named to the sum of $4,448.00.

James Parmalee has credits, subject to taxation, above his indebtedness on the day named to the sum of $3,113.60.

James Barnett has credits, subject to taxation, above his indebtedness on the day named to the sum of $17,792.00.

All of which is respectfully submitted.

A. J. RICKS,
Sp'l Master.

And afterwards, to wit, on the 8th day of November, being a day of the October term, A. D. 1886, of said court, the following decree was entered in this cause in said court:

Decree.

THE MERCANTILE NATIONAL BANK
vs.
HORATIO N. WHITBECK, Treas. of Cuyahoga Co.

At this term the parties appeared by their solicitors, and this cause came on for hearing upon the merits; and the court, being fully

advised in the premises from the testimony and exhibits and special master's report, adduced in open court, do find all the allegations of the bill to be true, except those allegations which charge that James A. Barnett, Robert L. Chamberlain, and James Parmalee were the owners of shares of capital stock of said bank from which
40 they were entitled to deduct, respectively, an indebtedness of theirs, which allegations, the court find, are untrue.

And it appearing to the court that the amount admitted in said bill to be due to said respondent has, pursuant to a former order of this court, been paid by said complainant to said respondent, and by him received—

It is therefore ordered, adjudged, and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect or from collecting any part or portion of said tax or assessment remaining unpaid, except the taxes levied upon the valuation of the shares of the capital stock of complainant, as fixed by the county auditor, owned by said Barnett, Chamberlain, and Parmelee, amounting to $659.29, the amount of tax hereby enjoined being $3,967.55; and it is therefore ordered, adjudged, and decreed that said respondent or his successors in office pay the costs in this suit to be taxed, for which it is ordered that execution may issue as upon judgments at law.

Aud afterwards, to wit, on the 31st day of January, being a day of the October term, A. D. 1886, of said court, the following order was entered in this cause in said court, viz:

Order Vacating Decree.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND
vs.
HORATIO N. WHITBECK, Treas. } No. 4411.

41 The above-entitled cause having been submitted to the court, and a decree having been entered in said cause in favor of the complainants therein, and the defendant desiring to present the questions arising in said cause to the Supreme Court of the United States to be finally decided, and for that purpose intending to appeal said cause, numbered 4411, on motion of said defendant it is now ordered by the court that the decrees hereinbefore entered in the above-entitled causes, numbered 4411, 4412, 4413, 4414, 4415, 4416, 4417, and 4418, be, and the same hereby are, set aside and vacated to await the further order of the court, and that the said several complainants have leave to apply at any time hereafter to have said decrees re-entered.

Approved.

HOWELL E. JACKSON,
Circuit Judge.

And afterwards, to wit, on the 8th day of April, A. D. 1887, the following bill of exceptions was filed in this cause, viz:

Bill of Exceptions.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, O., Complainant,
vs.
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, O., Defendant.

42 Be it remembered that on the trial of this cause at the October term, A. D. 1886, of the circuit court of the United States for the northern district of Ohio, eastern division, the complainant having offered testimony on its behalf tending to support the issues on its part, and having closed its testimony, the defendant, to maintain the issues on his part, and for the purpose of showing that throughout the State of Ohio the average rate at which moneyed capital other than the shares of the national banks in the hands of individual citizens of such State was valued for taxation in the year 1885 exceeding sixty-five (65) per centum of its true value in money, offered in evidence the testimony set forth in the depositions on file herein of the following-named witnesses, to wit: Richard Brown, S. L. Arnold, A. J. Frame, G. W. Rutledge, George W. Temple, Geo. W. McPeck, O. F. Serviss, Charles W. Webster, A. J. High, Asa Jenkins, J. W. Cassingham, B. F. Dum, Frank J. Reinhart, Joseph Staffort, W. R. Baker, George A. Crew, J. Henderson, B. B. Evans, O. F. Randolph, Horatio Pearson, W. M. Bowen, S. J. Wirick, John D. Turner, William T. Platt, William Howard, W. B. Gilbert, William F. Simmeral, H. R. Muhleman, C. C. Baker, F. H. Sherer, J. C. Beckett, Daniel Worley, William Wallace, Frank J. Eakar, Augustus Robb, B. F. Waples, John W. Kinsey, J. A. Wagner, R. J. Grigsby, Finley R. McLaughlin, C. Minnick, B. B. Stone, T. E. Beckinpaugh, W. W. Place, Geo. W. Le Fevere, J. N. Monmaker, Aaron Wagner, W. J. Jacobs, Andrew Foffinger, J. W. Brewster, James F. Lingdfeter, Will C. Fisby, W. W. Terry, M. S. Batram, W. T. Hill, A. A. Patterson, J. B. Elliott, L. M. Barrick, J. W. Shinn, J. B. Robinson, James Roland, and Legrand A. Olin; whereupon the
43 said complainant objected to the admission of all said testimony; which objection is sustained by the court, and all of said testimony was ruled out; to which ruling of the court and to the refusal to admit said testimony the defendant then and there excepted.

And thereupon the defendant offered and proposed to prove by the testimony of said witnesses, whose depositions have been duly taken and filed herein, as therein set forth, but the court refused to hear or admit any testimony as to said matters, holding, in accordance with the opinion of the presiding judge, that the only testimony competent or material in this action, in respect to the question of discrimination in valuation, is testimony relating to the valuation

of moneyed capital in the hands of individual citizens in the county of Cuyahoga, where said complainant bank is located; to which ruling and holding of the court and to the refusal to admit said testimony the defendant then and there excepted and prayed that this bill of exception in that behalf might be allowed, which is accordingly done, and upon his motion ordered to be made a part of the record in this case.

HOWELL E. JACKSON, [SEAL.]
Circut Judge.

M. WELKER, [SEAL.]
District Judge.

43¼ And afterwards, to wit, on Friday, the eighth day of April, being a day of the April term, A. D. 1887, of said court, the following decree was entered in this cause in said court:

Decree.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
vs.
HORATIO N. WHITBECK, Treas. of Cuyahoga County, Ohio.

At this term the parties appeared by their solicitors, and this cause came on for hearing upon the merits, and the court, being fully advised in the premises from the testimony and exhibits and special master's report adduced in open court, do find all the allegations of the bill to be true, except those allegations which charge that James A. Barnett, Robert L. Chamberlain, and James Parmelee were the owners of shares of capital stock of said bank from which they were entitled to deduct, respectively, an indebtedness of theirs, which allegations the court find are untrue; and it appearing to the court that the amount admitted in said bill to be due to said respondent has, pursuant to a former order of this court, been paid by said complainant to said respondent and by him received; it is therefore ordered, adjudged, and decreed that said respondent and his successors in office be forever enjoined from proceeding or attempting to collect or from collecting any part or portion of said tax
43½ or assessment remaining unpaid, except the taxes levied upon the valuation of the shares of the capital stock of complainant, as fixed by the county auditor, owned by said Barnett, Chamberlain, and Parmelee, amounting to $659.20, the amount of tax hereby enjoined being $3,967.55; and it is therefore ordered, adjudged, and decreed that said respondent, or his successor in office, pay the costs in this suit, to be taxed at $183.47, for which it is ordered that execution may issue as upon judgments at law.

And afterwards, to wit, on the 8th day of April, A. D. 1887, being a day of the April term, A. D. 1887, of said court, the following certificate was filed in this cause in said court, viz:

Certificate of Division of Opinion.

In the United States Circuit Court for the Northern District of Ohio, Eastern Division. October Term, A. D. 1886.

44 THE MERCANTILE NATIONAL BANK OF CLEVELAND, O., Complainant,
vs.
HORATIO N. WHITBECK, Treasurer of Cuyahoga County, O., Defendant. } No. 4411.

This cause being heard before the Honorable Howell E. Jackson, circuit judge, and the Honorable Martin Welker, district judge, upon the said complainant's bill of complaint, the answer of the defendant, and the replication of said complainant, and the evidence offered in the case, and it appearing from the testimony and being found by the court—

1. That moneyed capital (other than that invested in shares of national banks) in the hands of individual citizens of the city of Cleveland and county of Cuyahoga, in which the complainant bank is located, was by the rule of valuation fixed by the tax officers of said county and city valued for taxation in the year 1885 at sixty (60) per centum only of its true value in money.

2. That the auditor of said Cuyahoga county, in accordance with the provisions of section 2766 of the Revised Statutes of Ohio, fixed the total value of the shares of incorporated banks at sixty (60) per cent. of their true value in money in accordance with said rule.

3. That the auditor of said Cuyahoga county for the year 1885, in accordance with the rule and practice thereunder adopted for the valuation of other moneyed capital in the hands of individual citi-
zens of the city and county aforesaid, fixed the value of the
45 shares of said complainant for said year at sixty per cent. of its true value in money, and certified and transmitted the same to the annual State board of equalization for incorporated banks.

4. That the State board of equalization increased the value of the shares of the complainant from sixty (60) per cent. of their true value in money to sixty-five (65) per cent. of their true value in money, which latter value was certified to the auditor of said Cuyahoga county and by him placed upon the duplicate for said year and said duplicate delivered to the defendant, the treasurer of said county, for the collection of the taxes thereon; that in the year 1885 the total value of the levy for all purposes in said county and city was twenty-six mills on a dollar valuation, twenty-three mills and six-tenths of which were devoted to county and city purposes and but two mills and four-tenths State levy for State purposes.

5. That no demand for the deduction from the assessed value of any shares of the complainant of the amount of the *bona fide* indebted-

ness of any shareholders was made, either by the complainant or by any of its shareholders, until the 17th day of December, A. D. 1885, a date prior to the commencement of this action, at which time the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with the law to the treasurer of said county for the collection of said taxes; but the laws of Ohio make no provisions for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock and pro-
46 vide no means by which said deduction can be secured.

And the complainant having introduced testimony on its behalf tending to support the issues on its part, and having closed its testimony, the defendant, to maintain the issues upon his part, offered the testimony of sundry witnesses tending to show—

1. That throughout the State of Ohio, exclusive of Cuyahoga county and eleven other counties, there is and in the year 1885 was no rule, practice, custom, understanding, agreement, or combination, either on the part of assessors, county auditors, boards of equalization, or other taxing officers, whereby moneyed capital (other than the shares of national banks) in the hands of individual citizens of said State was appraised or valued for taxation for said year at less than its true value in money.

2. That throughout the State of Ohio, exclusive of Cuyahoga county and eleven other counties, moneyed capital (other than the shares of National banks) was in the year 1885 valued for taxation at its true value in money, in accordance with the constitution and laws of said State; and

3. That the percentage of their true value in money, at which the shares of national banks throughout the State of Ohio were valued for taxation in the year 1885, was less than the average percentage of true value in money at which other moneyed capital in the hands of individual citizens of such State was valued for taxation in said year.

To all which testimony the said complainant, by its counsel, objected, and said objection was sustained by the court and the
47 testimony of said witnesses was excluded by the court; to which ruling of the court and to the refusal to admit said testimony said defendant, by his counsel, then and there duly excepted.

And on the foregoing facts there occurred on the hearing of said cause the following questions of law upon which the opinion of the said judges were opposed:

1. Whether the valuation for taxation, as aforesaid, of the shares of the complainant by the State board of equalization for the shares of incorporated banks at sixty-five per centum of their true value was a discrimination prohibited by the act of Congress.

2. Whether the said testimony offered by said defendant and excluded by the court was admissible for the purposes stated.

3. Whether the rule for the valuation for taxation of other moneyed capital in the hands of individual citizens of said city and county where said complainant bank is located was the sole measure

for the valuation of the shares of national banks located therein or might the State board of equalization for the shares of incorporated banks lawfully value such shares at a rate not exceeding the average rate at which other moneyed capital in the hands of individual citizens of said State throughout said State is valued for taxation.

4. Whether the taxation of *of* national bank shares in the State of Ohio in the year 1885, without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceeding
48 the second Monday in May, 1885, and on the day preceeding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said shareholders not having deducted said *bona fide* indebtedness from any credits owned by them at either of said dates.

5. Whether the demand for such deduction, first made on the 17th day of December, 1885, was sufficiently early to entitle complainant's shareholders thereto.

Whereupon and on motion of the said defendant, by his counsel, that the points on which the disagreements have been made during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States to be finally decided, it is ordered that the foregoing statement of facts and of the questions upon which the opinions of the judges were opposed, all of which are made under the direction of the judges, be, together with the record of this cause, certified to said Supreme Court according to the said request of the said defendant, by his counsel, and pursuant to the statute in such case made and provided.

Dated this 22nd day of January, A. D. 1887.

HOWELL E. JACKSON,
Circuit Judge.
M. WELKER, *District Judge.*

49 And afterwards, to wit, on Tuesday, the eighth day of June, A. D. 1887, the following order was made in said cause in said court:

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, *vs.* HORATIO N. WHITBECK, Treas. of Cuyahoga County, Ohio.	Equity No. 4411.

In this cause the defendant comes and prays an appeal from the decree of April 8th, 1887, to the next term of the Supreme Court of the United States, which is allowed on executing a bond in sum of $500.00.

And afterwards, to wit, on the 28th day of April, A. D. 1887, the following bond was filed in said cause in said court, viz:

50 Know all men by these presents that we, David H. Kimberly, as principal, and W. H. Brew and T. K. Dissette, as sureties, are held and firmly bound unto the Merchantile National Bank of Cleveland in the sum of five hundred dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23d day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-bounden David H. Kimberly, the successor of Horatio N. Whitbeck as treasurer of Cuyahoga county, Ohio, has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the 8th day of April, A. D. 1887, in a cause wherein the said The Merchantile National Bank of Cleveland was complainant and the said Horatio N. Whitbeck, as treasurer of Cuyahoga county, Ohio, was respondent: Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal with effect and pay all such damages, costs, and expenses as shall be awarded against him as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

D. H. KIMBERLY. [SEAL.]
W. H. BREW. [SEAL.]
T. K. DISSETTE. [SEAL.]

Sealed and delivered in presence of—
V. Y. CUNNINGHAM.
JOHN HUGHES.

[Endorsed:] No. 4411. In the circuit court of the United States for the northern district of Ohio. The Merchantile National Bank of Cleveland *vs.* Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio. Appeal bond. Approved and filed June 28, 1887. M. Welker, judge.

51 *Certificate.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings in said court in the cause wherein The Mercantile National Bank of Cleveland, Ohio, is the complainant and Horatio N. Whitbeck, treasurer of Cuyahoga county, Ohio, is the defendant, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Cleveland, in said district, this 10th day of May, A. D. 1887, and in the one hundred and twelfth year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 970. Horatio N. Whitbeck, as treasurer of Cuyahoga county, Ohio, appellant, *vs.* The Mercantile National Bank of Cleveland, Ohio. Filed July 5, 1887.

24-193

Office Supreme Court U. S.
FILED.
JAMES H. MCKENNEY.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 970.

HORATIO N. WHITBECK, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK, OF CLEVELAND, OHIO.

Brief for Appellant.

JAMES LAWRENCE,
CLARENCE BROWN,
For Appellant.

DAVID K. WATSON,
Attorney-General of Ohio.
FRED'K L. GEDDES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

No. 970.

HORATIO N. WHITBECK, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, APPELLEE.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The appellee, the complainant below, is a National Banking Association, organized under the laws of the United States, and located in Cleveland, Cuyahoga county, Ohio. It brought its action to enjoin the appellant, as treasurer of Cuyahoga county, from collecting a certain percentage of the taxes charged against it on the tax duplicate of that county, for the year 1885, alleging as a basis of its complaint that the grievance complained of "arises and is exclusively founded on a violation by the defendant and others, whose unlawful acts he is carrying into effect, of rights of the shareholders of said national bank accorded them by section 5219 of the Revised Statutes of the United States." (Record p. 1.)

The questions involved arise upon the following

CERTIFICATE OF DIVISION OF OPINION.

This cause being heard before the Honorable Howell E. Jackson, circuit judge, and the Honorable Martin Welker, district judge, upon the said complainant's bill of complaint, the answer of the defendant, and the replication of said complainant, and the evidence offered in the case, and it appearing from the testimony and being found by the court—

1. That moneyed capital (other than that invested in shares of national banks) in the hands of individual citizens of the city of Cleveland and county of Cuyahoga, in which the complainant bank is located, was by the rule of valuation fixed by the tax officers of said county and city valued for taxation in the year 1885 at sixty (60) per centum only of its true value in money.

2. That the auditor of said Cuyahoga county, in accordance with the provisions of section 2766 of the Revised Statutes of Ohio, fixed the total value of the shares of incorporated banks at sixty (60) per cent. of their true value in money in accordance with said rule.

3. That the auditor of said Cuyahoga county for the year 1885, in accordance with the rule and practice thereunder adopted for the valuation of other moneyed capital in the hands of individual citizens of the city and county aforesaid, fixed the value of the shares of said complainant for said year at sixty per cent. of its true value in money, and certified and transmitted the same to the annual State board of equalization for incorporated banks.

4. That the State board of equalization increased the value of the shares of the complainant from sixty (60) per cent. of their true value in money to sixty-five (65) per cent. of their true value in money, which latter value was certified to

the auditor of said Cuyahoga county, and by him placed upon the duplicate for said year, and said duplicate delivered to the defendant, the treasurer of said county, for the collection of the taxes thereon; that in the year 1885 the total value of the levy for all purposes in said county and city was twenty-six mills on a dollar valuation, twenty-three mills and six-tenths of which were devoted to county and city purposes, and but two mills and four-tenths State levy for State purposes.

5. That no demand for the deduction from the assessed value of any shares of the complainant of the amount of *bona fide* indebtedness of any shareholders was made, either by the complainant or by any of its shareholders, until the 17th day of December, A. D. 1885, a date prior to the commencement of this action, at which time the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with the law to the treasurer of said county for the collection of said taxes; but the laws of Ohio make no provisions for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured.

And the complainant having introduced testimony on its behalf tending to support the issues on its part, and having closed its testimony, the defendant, to maintain the issues upon his part, offered the testimony of sundry witnesses tending to show—

1. That throughout the State of Ohio, exclusive of Cuyahoga county and eleven other counties, there is and in the year 1885 was no rule, practice, custom, understanding, agreement, or combination, either on the part of assessors, county auditors, boards of equalization, or other taxing officers, whereby moneyed capital (other than the shares of national banks) in the hands of individual citizens of said State was appraised or

valued for taxation for said year at less than its true value in money.

2. That throughout the State of Ohio, exclusive of Cuyahoga county and eleven other counties, moneyed capital (other than the shares of national banks) was in the year 1885 valued for taxation at its true value in money, in accordance with the constitution and laws of said State; and

3. That the percentage of their true value in money, at which the shares of national banks throughout the State of of Ohio were valued for taxation in the year 1885, was less than the average percentage of true value in money at which other moneyed capital in the hands of individual citizens of such State was valued for taxation in said year.

To all which testimony the said complainant, by its counsel, objected, and said objection was sustained by the court and the testimony of said witnesses was excluded by the court; to which ruling of the court and to the refusal to admit said testimony said defendant, by his counsel, then and there duly excepted.

And on the foregoing facts there occurred on the hearing of said cause the following questions of law upon which the opinions of the said judges were opposed:

1. Whether the valuation for taxation, as aforesaid, of the shares of the complainant by the State board of equalization for the shares of incorporated banks at sixty-five per centum of their true value was a discrimination prohibited by the act of Congress.

2. Whether the said testimony offered by said defendant and excluded by the court was admissible for the purposes stated.

3. Whether the rule for the valuation for taxation of other moneyed capital in the hands of individual citizens of said city and county where said complainant bank is located was the

sole measure for the valuation of the shares of national banks located therein, or might the State board of equalization for the shares of incorporated banks lawfully value such shares at a rate not exceeding the average rate at which other moneyed capital in the hands of individual citizens of said State throughout said State is valued for taxation.

4. Whether the taxation of national bank shares in the State of Ohio in the year 1885, without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceding the second Monday in May, 1885, and on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said shareholders not having deducted said *bona fide* indebtedness from any credits owned by them at either of said dates.

5. Whether the demand for such deduction, first made on the 17th day of December, 1885, was sufficiently early to entitle complainant's shareholders thereto.

Whereupon and on motion of the said defendant, by his counsel, that the points on which the disagreements have been made during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States to be finally decided, it is ordered that the foregoing statement of facts and of the questions upon which the opinions of the judges were opposed, all of which are made under the direction of the judges, be, together with the record of this cause, certified to said Supreme Court according to the said request of the said defendant, by his counsel, and pursuant to the statute in such case made and provided.

Dated this 22d day of January, A. D. 1887.

HOWELL E. JACKSON, *Circuit Judge.*

M. WELKER, *District Judge.* (Record p. 26.)

A decree was entered in the court below, in accordance with the opinion of the circuit judge, restricting the tax to the valuation as fixed by the auditor of Cuyahoga county, and perpetually enjoining the treasurer from collecting the sum levied upon the valuation as fixed by the State board for the equalization of bank shares. It was also decreed that the stockholders were severally entitled to deduct the amounts of their individual indebtedness from the value of the shares so fixed by the county auditor, and the collection of the tax levied upon a valuation equal to the amount of such indebtedness was accordingly enjoined. (Record p. 25.)

ARGUMENT.

The record presents substantially but three questions :

I. Was the necessary result of the action of the State board of equalization a discrimination against the shareholders in the appellee in favor of other moneyed capital in the hands of individual citizens of Ohio ?

II. Under the laws of the United States, and the constitution and statutes of Ohio, may a shareholder in a national bank deduct from the assessed value of his shares the amount of his *bona fide* indebtedness ?

III. If such deduction is allowed, was the demand therefor made within the proper time ?

Of these in their order :

I. WAS THE NECESSARY RESULT OF THE ACTION OF THE STATE BOARD OF EQUALIZATION A DISCRIMINATION AGAINST THE SHAREHOLDERS IN THE APPELLEE IN FAVOR OF OTHER MONEYED CAPITAL IN THE HANDS OF INDIVIDUAL CITIZENS OF OHIO ?

Shares in a national bank and other moneyed capital in the hands of individual citizens of the particular municipality or county, in which the complainant bank is located, having

been valued by the assessing officers of that municipality or county at sixty (60) per centum of their true value in money, can the State board of equalization for incorporated banks, both state and national, in valuing, and equalizing the values of, the shares of all incorporated banks in the State according to the rules prescribed for valuing, and equalizing the values of real and personal property generally, increase the valuation of the shares of complainant bank to sixty-five (65) per centum of their true value in money, other moneyed capital throughout the State being valued at not less than sixty-five (65) per centum of its true value in money? or

Is the rule for the valuation of other moneyed capital in the hands of individual citizens of the city or county where complainant bank is located, the sole measure for the valuation of the shares of national banks located therein? or

May the State board of equalization for incorporated banks, both state and national, in the equalization of the shares of all incorporated banks in the State of Ohio, lawfully value such shares at a rate not exceeding the average rate at which other bank shares, and other moneyed capital in the hands of individual citizens of said State, throughout said State, are valued for taxation?

Upon the hearing the appellant offered testimony tending to show that throughout the State of Ohio (except in Cuyahoga and eleven other counties) there was no rule, practice, custom, understanding, agreement or combination, either on the part of assessors, county auditors, boards of equalization or other taxing officers, whereby moneyed capital (other than the shares of national banks) in the hands of individual citizens of that State, was appraised or valued for taxation at less than its true value in money; that moneyed capital (other than the shares of national banks) was in fact valued at its true value in money in accordance with the constitution and laws of the

State; and that throughout the entire State (not excepting any county) other moneyed capital was valued for taxation *at a greater percentage* of its true value in money, than were shares of national banks:—in other words, that the average percentage at which other moneyed capital was valued for taxation throughout the State of Ohio was more than sixty-five (65) per centum of its true value in money. (Record p. 27.)

The court refused to hear or admit any of the testimony so offered, holding, in accordance with the opinion of the circuit judge, that the only testimony competent or material in this action, in respect to the question of discrimination in valuation, was testimony relating to the valuation of moneyed capital in the hands of individual citizens in the county of Cuyahoga, where complainant bank was located. (Record pp. 24 and 25.)

The first three questions embodied in the certificate of division of opinion, will therefore be treated, in this argument as constituting but one subject of controversy, and that as above indicated.

It is contended by appellee that the necessary result of the action of the State board of equalization was to discriminate against its shareholders, because, it is claimed, the comparison between the taxation of national bank shares and other moneyed capital must be limited to the moneyed capital in the hands of individual citizens of the particular municipality or county in which the bank is located, and that such comparison shows a discrimination to the prejudice of appellee's shareholders.

1. To confine the ascertainment of the relative taxation of national bank shares and other moneyed capital to the particular municipality or county in which the bank is located is clearly at variance with the express provisions of the federal statute.

SEC. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

The tax to which the shares may be subjected, and which must not exceed the tax on other moneyed capital, is the tax "imposed by authority of the State." This includes every possible tax charge that can be levied against national bank shares or other moneyed capital throughout the State. No tax can be imposed except by authority of the State, exercised either directly, through the legislature, or by delegated authority, through municipal and county officers.

This power of taxation is subject only to the two restrictions (1) that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens *of such State*, and (2) that the shares of any national banking association, owned by non-residents of any State shall be taxed in the city or county where the bank is located, and not elsewhere.

By the express terms of the statute, therefore, the comparison is to be coextensive with the territorial limits of the State's authority to impose taxes, and is to extend to the burden imposed by that authority upon other moneyed capital in the hands of individual citizens of the entire territory throughout which the authority may be exercised, namely, "such State."

This view is sustained by the further provision of the statute that shares owned by non-residents shall be taxed in the city or town where the bank is located, and not elsewhere. Had it been the intention of Congress to limit the comparison to moneyed capital in the hands of individual citizens of the city or town where the bank is located, the unequivocal language used in the latter would doubtless have been used in the former restriction as well. If the territorial limitation was designed to be the same in both cases it would have been natural to make the enactments identical in that particular—to have enacted that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens *of the city or town in which the bank is located.*

By a well recognized rule of construction the restriction of the rate of taxation to that which is imposed upon a specified class of property in the hands of certain citizens of the *State*, precludes the theory that it is a restriction to the rate imposed *in each particular municipality and county* of the State. The affirmative limitation to the State is an implied negative of any different limitation.

"If a thing is limited to be done in a particular form or manner it excludes every other mode."—Sedg. on Con. of Stat. and Con. Law, 31 (a).

2. Such an interpretation of the statute is likewise at variance with its manifest policy and purpose.

In *Mercantile Bank* v. *New York*, 121 U. S. 138, this court said:

"The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the

people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under State laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of State laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy." (pp. 154 and 155.)

In view of this interpretation of the statute it is difficult to see how the comparison between the rate of taxation of shares in national banks and other moneyed capital can be restricted to the narrow limits of a single municipality or county. Of course it is not contended that the comparison is to be extended to embrace *all* moneyed capital in the hands of *every* individual citizen of the State, any more than it is to be

limited to *some* moneyed capital in the hands of a *single* individual citizen of the State.

The construction contended for by appellant is that, as the purpose of Congress was "to render it impossible for the State * * * * * * to create and foster an unequal and unfriendly competition," a violation of the statute can only be shown either by proof of an intent on the part of the officers of the State to discriminate against national bank shares, or by a comparison with other moneyed capital sufficiently extensive to raise a presumption of such intent from the prevalence of the inequality.

In *Hepburn* v. *School Directors*, 23 Wall. 480, the court said: "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." (p. 485.) And this must be equally true whether the exemption was total or partial only. It was not designed by this restriction to attempt to secure absolute equality and uniformity in the burdens of taxation, but simply to secure that substantial equality between bank shares and other moneyed capital necessary to the profitable existence of both forms of investment.

3. That the necessary result of the action of the State board of equalization was not a discrimination prohibited by the act of Congress, will be seen from an examination of the

Provisions of the Constitution and Statutes of Ohio.

CONSTITUTION.

ARTICLE XII. FINANCE AND TAXATION.

SEC. 2. Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money; * * * .

SEC. 3. The general assemby shall provide, by law, for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description, (without deduction,) of all banks, now existing, or hereafter created, and of all bankers, so that all property employed in banking, shall always bear a burden of taxation, equal to that imposed on the property of individuals. * *

ARTICLE XIII. CORPORATIONS.

SEC. 4. The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals.

REVISED STATUTES OF OHIO 1880.

PROPERTY TO BE TAXED.

SEC. 2731. All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; * * * *

LISTING PERSONAL PROPERTY.

SEC. 2734. Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft; and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely; * * * *

SEC. 2739. In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, stock, joint stock companies, or otherwise, shall be valued at the true value thereof in money; money,

whether in possession or on deposit, shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a sum certain, payable either in money, property of any kind, labor, or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or services of any kind, it shall be valued at the current price of such property or of such labor or service, at the place where payable; and annuities, or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing.

LISTING CORPORATE PROPERTY.

SEC. 2744. The president, secretary, and principal accounting officer of every canal or slack-water navigation company, turnpike company, plank road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village, or township. * * *

LISTING BANK SHARES.

SEC. 2762. All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located, and not elsewhere.

SEC. 2765. The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and the second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

SEC. 2766. (As amended March 9, 1883; 80 Ohio Laws, 54.) Upon receiving such report, the county auditor shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor.

LISTING RAILROAD PROPERTY.

SEC. 2770. The county auditors of the several counties in this state in which any railroad company now has, or hereafter may have, its track and roadway, or any part thereof, shall constitute a board of appraisers and assessors for such railroad company; any railroad company having its road, or any part thereof, in one county only, the auditor of such county shall constitute such board.

SEC. 2772. It shall be the duty of each board to meet in the month of May * * * and proceed to ascertain all the personal property, which shall be held to include roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys, and credits of such company. * * * It shall be the duty of said board of appraisers and assessors to report annually, on or before the first Monday in the month of June, to the auditor of state, the amount assessed upon each railroad company, specifying the total sum, and amount distributed to each county; * * * *

SEC. 2774. (As amended April 27, 1885; 82 Ohio Laws, 160.) The value of such property, moneys and credits of any railroad company, as found and determined by such board, shall be apportioned by said board among the several counties through which such road, or any part thereof, runs, * * * *

and so that the rolling stock, main track, road bed, supplies, moneys and credits of such company shall be apportioned in the same proportion that the length of such road in said county bears to the entire length thereof in all said counties or county, and to each city, village and district, or any part thereof therein; * * * * and the board shall certify to the county auditor of each county, and to each city, incorporated village, township and district, or any part thereof therein interested, the amount apportioned to his county, and the board shall make and forward a like certificate, together with all the reports of the various railroad officers, and other papers and evidence which formed the basis of their valuation, to the auditor of state, for the use of the state board of equalization of railroad property. * * * *

BOARDS OF EQUALIZATION.

County and City Boards.

SEC. 2804. There shall be an annual county board for the equalization of the real and personal property, moneys, and credits in each county, exclusive of cities of the first and second class, to be composed of the county commissioners and county auditor. * * * * Said board shall have the power to hear complaints and to equalize the valuation of all real and personal property, moneys, and credits within the county. * * *

SEC. 2805. (As amended April 5, 1882; 79 Ohio Laws, 71.) In each city of the first and second class there shall be an annual board for the equalization of the value of real and personal property, moneys, and credits in such city, to be composed of the county auditor and six citizens of such city, appointed by the council thereof;

SEC. 2806. (As amended March 9, 1883; 80 Ohio Laws, 54.) The county auditor shall lay before each of the above-named boards, for the territory they respectively have jurisdiction over, the returns of the assessors for the current year. * * *

SEC. 2807. (As amended March 9, 1883; 80 Ohio Laws, 54.) The said boards shall hear complaints and equalize the assessments of all personal property, moneys and credits, new entries and new structures returned for the current year, by the township assessors and county auditors; * * *

State Board for Incorporated Banks.

SEC. 2808. (As re-enacted March 9, 1883; 80 Ohio Laws, 55.) The governor, auditor of state, and attorney-general shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of state, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the state auditor.

SEC. 2809. (As amended March 9, 1883; 80 Ohio Laws, 55.) Said board shall hear complaints and equalize the value of said shares according to the rules prescribed by their [this] title for valuing and equalizing the values of real and personal property, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such a per cent. as will equalize said shares to their true value in money; provided, that said board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors, by more than twenty (20) per centum.

SEC. 2810. (As re-enacted March 9, 1883; 80 Ohio Laws, 55.) The auditor of state shall forthwith, after such equalization shall have been made, certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situated in such counties, which valuation shall be put on the proper tax-list.

State Board for Railroads.

SEC. 2811. The auditor of state, treasurer of state, and the attorney-general, shall also constitute a board of equalization of the values of the property of railroad companies as the same are fixed by the county auditors; and for this purpose they shall meet at the office of the auditor of state, on the Wednesday after the tenth day of June, annually, and examine the returns and documents sent to the auditor of state by the boards of county auditors in this behalf.

SEC. 2812. The said board shall hear complaints and equalize said values by adding to the valuation of the property of such companies as have been undervalued, and deducting from the valuation of the property of such as have been over-

valued; provided, that the board, in such equalization, shall not reduce the aggregate of the value of the property of railroad companies within the State below the amount returned by the board of county auditors.

LEVY OF TAXES.

State Taxes.

SEC. 2820. There shall be levied, annually, taxes for state purposes, on each dollar of valuation of taxable property, such sum or sums as now are, or may be, from time to time, provided by law.

State School Tax.

SEC. 3951. For the purpose of affording the advantages of a free education to all the youth of the state, there shall be levied, annually, a tax upon the grand list of taxable property of the state, which shall be collected in the same manner as other state taxes are collected, and the proceeds of which shall constitute the "state common school fund"; the rate of such levy shall be designated by the general assembly at least once in two years; * * *

District School Tax.

SEC. 3885. The state is hereby divided into school districts, to be styled respectively city districts of the first class, city districts of the second class, village districts, special districts and township districts.

SEC. 3958. (As amended April 14, 1884; 81 Ohio Laws, 178.) Each board of education shall annually, * * determine by estimate, as nearly as practicable, the entire amount of money necessary to be levied as a contingent fund for the continuance of the school or schools of the district, after the state funds are exhausted, * * *

County Taxes.

SEC. 2823. The commissioners, at their June session, annually, may levy on each dollar of valuation of taxable property within their county, for county purposes other than for roads, bridges, county buildings, sites therefor, and the purchase of lands for infirmary purposes, as follows: * *

Township Taxes.

SEC. 2827. The trustees of each township shall, on or before the fifteenth day of May, annually, determine the amount of taxes necessary for all township purposes, and certify the same to the county auditor. * *

Municipal Taxes.

SEC. 2681. The trustees of hamlets shall have power to levy, annually, upon the taxable property therein, such rate of taxes as may be necessary for the purposes mentioned in chapter one, of division three, of this title, not exceeding ten mills on the dollar, for all purposes, in any one year. * * *

SEC. 2682. The council of a city or village shall have power to levy, annually, for the general purposes of the corporation, such amount of taxes, on each dollar of valuation of taxable property in the corporation on the tax-list, as may be determined upon by it, not exceeding the following rates: * *

SEC. 1036. The auditor, after receiving from the auditor of state, and from such other officers and authorities as are legally empowered to determine the rates or amounts of taxes to be levied, for the various purposes authorized by law, statements of the rates and sums to be levied for the current year, shall forthwith proceed to determine the sums to be levied upon each tract and lot of real property, adding the taxes of any previous year that have been omitted, and upon the amount of personal property, moneys, and credits, listed in his county, in the name of each person, company, or corporation, which shall be assessed equally on all real and personal property subject to such taxes. * * *

It is contended on behalf of the appellee that under this system of valuation, taxation and equalization, the comparison between national bank shares and other moneyed capital must be limited to the particular municipality or county in which the bank is located, because that is the territorial unit of locality for taxation of personal property.

We understand it is not contended (and if there were such contention it is not sustained by the finding of fact embodied in the certificate of division,) that there was any intention or design to discriminate against shares in national banking associations and in favor of other moneyed capital, except as such intention or design may be presumed from the results of the equalization of shares of incorporated banks by the state board of equalization.

In *Cummings* v. *National Bank*, 101 U. S. 153, the system of taxation at the time in force in the State of Ohio was considered by this court and it was held that the statute creating the board for equalizing bank shares was not void as a violation of the constitution of Ohio, which requires that all moneyed capital shall be taxed by a uniform rule according to its true value in money, because if the local assessors would discharge their duty by assessing all property at its actual cash value, the operation of the equalizing board would work no inequality of taxation.

For a like reason it may be said that the present statute which is similar to, but not identical with, the one there considered, is not in conflict with §5219 of the Revised Statutes of the United States, which requires substantial equality in the taxation of national bank shares and other moneyed capital in the hands of individual citizens.

It was also found in *Cummings* v. *National Bank*, that "throughout a large part of Ohio, * * * * perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system, by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at three-fifths of its true value. The State board of equalization of bank shares increased the valuation of them to their full value." In the present case the taxing officers of the county in which the bank was situated valued both national bank shares and other moneyed capital at sixty per cent. of their true value in money. This undervaluation was confined to the county of Cuyahoga. It did not prevail throughout a large part of Ohio, but on the contrary there did prevail throughout seventy-six of the eighty-eight counties of the State absolute compliance with the constitution and the statutes of the state, which require the valuation of all per-

sonal property at its true value in money. Indeed, as the evidence offered by appellant tended to show, throughout the entire State of Ohio, including the county of Cuyahoga and every other county in the State, the *average* rate at which moneyed capital, including shares in national banks, was valued for taxation, exceeded sixty-five per cent. of its true value in money,—the value fixed upon appellee's shares by the state board of equalization. Thus the case at bar presents an entirely different question from the one decided in *Cummings* v. *National Bank.*

It is urged, however, that because the valuation and equalization of shares of incorporated banks throughout the State results in an inequality as between *some* national banks and *some* moneyed capital by thus restricting the comparison to a particular locality, therefore a discrimination results which is prohibited by the restriction of the federal statutes.

The present act providing for the state board for the equalization of shares of incorporated banks differs from that considered in *Cummings* v. *National Bank.* By virtue of the statute there considered the board of equalization of bank shares had "no power to consider the valuation of real estate * * * or other personal property and invested capital." (101 U. S. 160.)

The present statute, in effect, authorizes the state board of equalization of bank shares to make a new appraisal or valuation according to rules prescribed for valuing and equalizing the values of real and personal property throughout the state, subject only to the restriction that the grand aggregate value of bank shares as returned by the several auditors shall not be increased or reduced by more than twenty per centum. Under this statute, therefore, the state is the real taxing district for the shares of incorporated banks, so far as their valuation is concerned, for the shares are finally valued by officers of the state at large.

Nor is this inconsistent with the provisions of §5219 of the Revised Statutes of U. S., which expressly permits the legislature of each state to determine and direct the manner and place of taxing shares of banking associations located within the state, subject only to the two restrictions: (1) that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state; and (2) that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. The latter restriction manifestly refers merely to the place where the shares are listed and the taxes thereon collected, and has no reference to the mode of valuation, being designed simply to prevent duplicate taxation.

In the *State Railroad Tax Cases*, 92 U. S. 575, this court held that it was neither in conflict with the constitution of Illinois, which provided that taxation in general should be uniform and equal, nor inequitable, that the entire taxable property of a railroad company should be ascertained by the state board of equalization, and state, county, and city taxes should be collected within each municipality on this assessment.

To hold that the comparison can be made only with moneyed capital in the hands of individual citizens of the locality in which the bank is located, is practically to annul the provisions of the statute of Ohio creating a state board of equalization of bank shares. If that board exercise any functions whatever, it must value the shares of all the banks of the state, whether state or national, upon precisely the same basis. To do otherwise would be to make an open discrimination. It is quite as much a discrimination to favor one national bank as against another national bank in the same state, as it is to discriminate in favor of state banks or other moneyed capital in the hands of individual citizens of the state. But if

the state board of equalization is to be limited in its valuation and equalization of all the shares of all the banks of the state to the particular per cent. of value adopted by the local taxing officers of any particular locality, then the inevitable consequence would be a valuation varying according to the varying judgments of the local officials in the eighty-eight counties of the state.

The state board of equalization might thus be required to value the shares of a national bank located in the city of Cleveland at sixty per cent of their true value in money, and at the same time to value the shares of a bank located in Cuyahoga county, outside of Cleveland, or in an adjoining county, at one hundred per cent. of their true value in money. Surely such a method as this could not but tend to "create and foster an unequal and unfriendly competition."

But it cannot be truthfully said that the county or city is, under the laws of Ohio, the territorial unit of locality for the taxation of personal property; and certainly the county and city cannot both be such unit.

As will be seen from the foregoing statutes of the state, the entire state is the unit for the valuation of bank shares. Other moneyed capital in the hands of individual citizens is listed by the ward or township assessors, and valued and equalized by a city or a county board of equalization according to the location of the property. So there are at least three different original jurisdictions for the valuation and equalization of national bank shares and other moneyed capital in the hands of individual citizens of the state.

So far as the levying of taxes in the State of Ohio is concerned there is no single taxing district, or unit, any more than there is with respect to the valuation of property for the purpose of taxation. The levying of taxes is entrusted to many diverse authorities. A uniform state tax is levied on all the

property throughout the state by authority of the general assembly. There are county, township, municipal, state school, district school, and other taxes levied by the proper authorities. The taxes paid by any taxpayer upon any particular property include at least four, and usually more, separate levies, one extending throughout the state, the others throughout the the city, county, or district in which the property is located.

It is true that when the valuations of the various classes of property have been ascertained in the diverse modes before indicated the same are entered upon the tax duplicate of the county in which the property is located, and all the different levies of taxes are collected by the county treasurer or the local tax collector; but surely this does not make the county, or the particular local district, the exclusive taxing district in any sense whatever. It simply indicates the mode and place of collection, which are wholly immaterial where the valuation of property and the levies for taxation have been otherwise fixed. The truth is that under the laws of the State of Ohio, the state, the city, the county, the township, the municipal corporation, the school district and other municipalities and localities are each and all taxing districts.

Accordingly if the comparison between national bank shares and other moneyed capital must be limited to the particular taxing district, it must be limited to territory varying as the tax varies: if a city tax, to the city; if a county tax, to the county; if a school tax, to the school district; if a common school fund tax and the general tax levy of the state, to the entire state. If the comparison may be extended from the school district to the municipality, and from the municipality to the county, why should it not also be extended from the county to the state?

In Ohio the equalizing process in the valuation of all moneyed capital, other than bank shares and railroad capital,

ceases with the city and county boards. Nevertheless this court has expressly affirmed the validity of the statute creating the state board for equalizing bank shares. *Cummings* v. *National Bank*, 101 U. S. 153.

The function of that board is to equalize the valuation of those shares, as among themselves, according to the rules prescribed for valuing and equalizing the values of other moneyed capital throughout the state. It may not lawfully, therefore, leave uncorrected inequalities in valuation made by different county auditors. Its aim must be to value the shares of all banks throughout the state at the same percentage of their true value in money.

The state is therefore necessarily the territorial unit for the purpose of the comparison between the rate of taxation of national bank shares with that of other moneyed capital. And the requirements of the federal statute are fully satisfied if the average valuation of national bank shares throughout the state is not at a greater percentage of their true value in money, and their taxation is not at a greater rate, than the average valuation and taxation of other moneyed capital throughout the state.

The purpose of the federal statute was to prohibit discrimination by states against national banks. Its purpose is fully effected if there is no substantial discrimination against national banks generally. The vain attempt to correct all inequalities in taxation was not thereby made. An unintentional discrimination of perhaps five per cent. in favor of the moneyed capital of a small part of the state as against the shares of the national banks of that locality was not prohibited, if there was no intentional discrimination against these banks, and no discrimination in fact against national banks generally.

If the minimum percentage of its true value in money, given by any city or county board of equalization to moneyed capital other than bank shares, were the standard of com-

parison, under the federal statute, of the valuation of the shares of national banks in that city or county, it would be the standard also for the whole state. And the state board of equalization for bank shares would have no other duty than to reduce the valuation of the shares of all banks throughout the state to the percentage of true value given to other moneyed capital by that county or city board which has, in violation of law, valued such moneyed capital at the smallest fraction of its true value. The failure of the state board so to reduce all values to the percentage of the minimum county or city, would justify the interference of courts of equity by injunctions in the case of every national bank in the state. The state would not, in that case, be the territorial unit of comparison, but that single municipality which should be afflicted with the local board having the least regard for law would become the territorial unit of comparison, not merely for banks located within its limits, but for every national bank in the whole state.

For the purpose of ascertaining the character and extent of the inequality alleged to amount to discrimination between shares in national banks and other moneyed capital this court has uniformly looked beyond the territorial limits of the county or city within which the bank was located, unless the discrimination was found to be the inevitable result of the statute, in which event it necessarily extends to all banks within the state, although the comparison may be confined to a single city or county. In *Pelton* v. *National Bank*, 101 U. S. 143, and in *Cummings* v. *National Bank*, 101 U. S. 153, the court found that the assessing officers combined together and established a rule or principle of valuation extending throughout a large portion of the state, the necessary result of which was to tax national bank shares at a higher rate than other moneyed capital and higher than the aver-

age rate at which moneyed capital was taxed. In these cases there was no attempt at equalization with other moneyed capital, national bank shares being valued at 100 per cent. of their true value in money, while other moneyed capital was valued at 60 per cent. The discrimination was found, moreover, to have been intentional.

In the case at bar, on the contrary, there was no intention to discriminate. The inequality was confined to a particular city, was comparatively small, and resulted from an attempt to equalize the shares of all banks, state and national, throughout the state, according to the rules prescribed for the valuation and equalization of other moneyed capital throughout the state. It is not contended that this process of equalization resulted in either intentional or unintentional discrimination, as a rule applicable to moneyed capital in general. This court has frequently recognized the propriety of such efforts to secure equality and uniformity of taxation through the medium of boards of equalization.

In *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, this court said:

"In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes the right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitu-

tions of some states is complied with, when designed and manifest departures from the rule are avoided.

"To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. * * * *

"When the over-valuation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally *not merely on a single individual but on a large class of individuals or corporations*, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due." (pp. 550 and 551.)

If it be conceded that the state board of equalization has authority to act in any capacity, then to restrict its functions to the extent claimed by the appellee would be to cause numerous and gross inequalities, with the design of relieving accidental and trifling ones. As a result of the action of the state board of equalization appellee's shares are valued at five per cent. more than some moneyed capital, but the valuation of all the shares of all other banks, state and national, and all other moneyed capital in the state is by that action equalized. In an attempt to create absolute equality between appellee's shares and the moneyed capital of Cleveland the court is asked to establish inequality between appellee and all other national and state banks and all other moneyed capital throughout the state, outside the city of Cleveland, and inequality as compared with the state banks within the city of Cleveland. The court is asked to overturn the policy of the state designed to secure equality and uniformity in the taxation of this class of property, in order that the inequalities which this court has repeatedly said were inevitable may be remedied.

If the comparison should be limited to the particular municipality or county in which the bank is located, appellant still

contends that the inequality would not affect a material part relatively of the whole moneyed capital sufficiently to indicate a purpose or design to discriminate. The discrimination shown in the case of *Cummings* v. *National Bank* was so great (the comparison being made with the real estate appraisal of 1870 and the bank shares being appraised at their full value) that the exemption of other property from taxation in a few large counties like Cuyahoga and Lucas might possibly be deemed substantial and material even as compared with the banking and other moneyed capital of the entire state. If a case should now arise where the valuation of other moneyed capital in particular counties is so much below the average rate throughout the state that the exemption of other moneyed capital from taxation in such counties would be serious as compared with the whole amount of moneyed capital in the state, the courts might be inclined to give special relief, but we submit that no such case is presented here. Taking the respective appraisals of national bank shares and of other moneyed capital in Cuyahoga county or the city of Cleveland, there is no such discrimination against the former as to make the exemption of the particular part of moneyed capital held by individuals in that county or city so serious and material as to infringe the rule of substantial equality enjoined by the act of congress.

The most that is claimed here by appellee is that in Cuyahoga county other moneyed capital was valued for taxation in the year 1885, at sixty per cent. of its true value, while the state board of equalization valued the shares of all incorporated banks, both state and national, at sixty-five per cent. of their true value.

Without recurring to the various cases decided by this court, wherein it has been held that certain exemptions were, while others were not, of a material part relatively of the

whole moneyed capital, it is sufficient to say that the case at bar comes clearly within the rule laid down by the more recent decisions of this court.

In *German National Bank* v. *Kimball*, 103 U. S. 731, the bill contained averments tending to show that the valuation of the property of other persons in the same town, made by the same assessor, was less in proportion to its actual cash value than that of complainant's shares, and that the same was true of other parts of the state, and that some corporations were favored in this valuation, and that certain classes of property were favored in a general way. There was no averment in the bill that the shares of the complainant bank were valued higher, for the purposes of taxation, than other moneyed capital generally, though this was alleged in regard to particular instances. The allegations of the bill were, that the assessments were partial, unequal and unjust, and did not result in uniformity of taxation. The court said in that case, after referring to the universality of the rule that mere inequalities did not amount to discrimination, and the exception to that rule, where the assessing officers combined and adopted a rule for the valuation of one species of property higher than others, and higher than the average rate:

"But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject. So far as anything of the kind is to be inferred, it is that shares of national bank stock, including the complainant's, were assessed at only thirty-four per cent. of their value, which, by the board of equalization, was raised to fifty-three per cent.; and other property more, and still other less. The case, then, made by the complainant is this: that the shares of the bank are taxed at the same per cent. on their assessed value as all other property; that the valuation of these shares, on which this rate is apportioned, is only about half

their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of stock of the complainant." (p. 735.)

The bill was accordingly dismissed.

In *Supervisors* v. *Stanley*, 105 U. S. 316, wherein the bill alleged that the assessment of complainant's shares was at a greater rate than was assessed upon shares of stock in a bank organized under the laws of the State of New York, located in the sixth ward of the city of Albany, and was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York, it was held that this was not a sufficient allegation of a distinct ground of recovery to entitle the complainant to the relief demanded, the court saying: "We are quite clear that the shares of the plaintiff are not relieved from taxation because a single bank of the State has been favored by mistake or by intention. For errors of this kind the statutes of New York provide the correction, which should be taken in time, and we should be very reluctant to hold that when it has been shown that a single bank or a single individual has been taxed less than he should be, all other taxes, however just, are thereby invalidated." (pp. 317 and 318.) As to the other branch of the averment of the bill that the assessment "was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York," the court said: "If by this it is supposed that a few individual instances may be shown, of partial assessments favoring citizens, as compared with the national banks, we think it is erroneous." (p. 318.)

In *Mercantile Bank* v. *New York*, 121 U. S. 138, the court said, in reference to the exemption of $13,467,000 of the municipal bonds of the city of New York, that the amount of this exemption was comparatively small, looking at the whole amount of personal property and credits which were the

subjects of taxation, and was not large enough to make a material difference in the rate assessed upon national bank shares. (p. 162.)

The case at bar comes clearly within the rule laid down in the case of *Williams* v. *Supervisors of Albany*, 122 U. S. 154. In that case, as in this, there was no intentional discrimination against the shares of national banks, except as that intention was claimed to be shown as the unerring consequence of the rule of valuation adopted by the assessors. It was contended there, as here, that the inequality resulted not from accident or from an erroneous judgment on the part of the assessors, but from a rule which the assessors adopted; in other words, that it resulted from the illegal system adopted by the assessors, and not simply from erroneous judgment. The actual value of the shares of certain banks within the city of Albany was found to vary from less than par to over 100 per cent. above par, the shares of the bank in which complainant was a stockholder, having an actual value of from 25 to 30 per cent. above par. The assessors adopted a rule fixing the value of all shares of the national banks of Albany at par, thus establishing an inequality in the percentage of their true value in money, at which the shares were valued for taxation, of over 100 per cent. It was contended that the adoption of such a rule of valuation inevitably resulted in a discrimination against the shares owned by complainant, which were worth but 25 per cent. more than par, as compared with shares in other banks worth 100 per cent. more than par, and that the consequence of such inevitable discrimination could not be avoided by the claim that the consequences were not the result of design. But the court said:

"Considering the nature of the property, and the frequent fluctuations in value to which it is subject, the method applied to all banks, state and national, came, as we said in the recent case of Stanley against the same defendants, as nearly as prac-

ticable to securing between them equality and uniformity of taxation. All the banks, state and national, being thus placed as respects taxation, upon the same footing, the method could not be considered as adopted in hostility to any of them. If it sometimes led to undervaluation of the shares of national banks, the holders could not complain. If it sometimes led to overvaluation of the shares, the aggrieved party could obtain relief by pursuing the course pointed out by the statute for its correction."

In *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, where substantially the same question was under consideration, and the court having found that the assessors did not habitually or intentionally, or by any rule prescribed by themselves or by any one whom they were bound to obey, assess the shares of national banks higher in proportion to their value than other moneyed capital generally, this court said:

"The counsel for the plaintiff insists, however, notwithstanding this finding, that the inference of such habitual assessment at a higher rate follows from the findings, that within the city of Albany there were nine banks, and that the actual value of the shares in all of them except one exceeded their par value, varying in that respect from 10 to 70 per cent. premium, and yet the value of all was assessed at par. * * * * * A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject, their value depending very much on the skill and wisdom of the managers of those institutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively, the nominal value is the true value, any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, national and state, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing." (pp. 548 and 549.)

If, then, an inequality of upwards of 100 per cent. of the par value of national bank shares, resulting from the adoption of a method designed to secure equality, is not a discrimina-

tion prohibited by the statute, surely an inequality of five per cent. would not come within the restriction of the statute, especially where it was shown that the valuation, as fixed, is less than the average valuation of national bank shares generally and other moneyed capital throughout the state in which the bank is located.

Thus the aim of the court has been to enforce not exact but substantial equality, and in determining this the basis of comparison is not the rate at which the property of particular individuals is valued for taxation, but is the average rate at which the property of individuals generally is valued.

Furthermore all the cases agree that to entitle the complainant to relief, where the inequality complained of is not the result of a statute of the state designed to discriminate injuriously against national banks, but is the result of the action of the assessing officers, such discrimination must be intentional. In the present case, as we claim, the real assessing officers for bank shares were the members of the state board of equalization, and hence the purpose to discriminate must be traced to that board. The very fact that the state board of equalization adopted and fixed any percentage less than the true value of bank shares and less than the average valuation of other moneyed capital throughout the entire state, is of itself a strong presumption that it had no intention to discriminate against that class of property, but rather that its purpose was to conform in a measure to the system of undervaluation of other moneyed capital prevailing in Cuyahoga county. The shares of incorporated banks being the only property valued in the first instance by the several county auditors and then by the state board of equalization for banks, and the net result of the action of these authorities being the valuation of all the shares, both state and national, on precisely the same basis, it is certain that there was no discrimination in fact in respect to the class of prop-

perty falling within the jurisdiction of that board. If there be any discrimination in fact as between this class of property and other moneyed capital, it results from the action of diverse authorities having no control over each other; hence intentional discrimination cannot be established by merely showing a slight variance between the valuations arrived at by these independent authorities, acting separately from each other, and each affected by many circumstances unknown to the other. Only gross inequality between the valuations of the different classes of moneyed capital thus fixed can reasonably be regarded as proof of intentional discrimination.

In the latest utterance by this court on this subject, the view contended for by complainant is sustained.

In *Davenport* v. *Davenport Board of Equalization*, 123 U. S. 83, it is said:

"It has never been held by this court that the states should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the states is uncontrolled by the act of congress."

II. UNDER THE LAWS OF THE UNITED STATES, AND THE CONSTITUTION AND STATUTES OF OHIO, MAY A STOCKHOLDER IN A NATIONAL BANK DEDUCT FROM THE ASSESSED VALUE OF HIS SHARES THE AMOUNT OF HIS BONA FIDE INDEBTEDNESS?

Under the provisions of the constitution of Ohio, cited supra, laws must be passed "taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also real and personal property according to its true value in money."

The provisions of the statutes of Ohio, under which it is claimed that the owners of moneyed capital other than shares in national banks are entitled to deduct the amount of their *bona fide* indebtedness, are as follows:

PERSONAL PROPERTY GENERALLY.

SEC. 2730. * * the terms "investment in bonds," shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state * *; the terms "investments in stocks," shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state * *; the terms "personal property" shall be held to mean and include, first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name the same may be designated * *; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument

may have been given for the same, if between the parties the same is considered as security merely; the term "money" or "moneys," shall be held to mean and include any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw, in money on demand; the term "credits," shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal bona fide debts owing by such person; * * and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease and remain unpaid; * *

See also section 2734, supra, p. 13.

SEC. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or, within ten days thereafter, make out and deliver to the assessor, a statement, verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required to list for taxation, * *

(Sec. 2737, additional provisions.) * * * thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; * * * *

See also section 2739, supra, p. 13.

SEC. 2747. The listing of all personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or

otherwise, shall be made between the second Monday of April and the third Monday of May, annually; and the assessor shall, on or before the first Monday of May, annually, leave with each person, resident in his township or ward, of full age, and not a married woman, or insane person, or at the office, usual place of residence or business of each person, a written or printed notice, requiring such person to make out for the assessor a statement of the property which, by law, he is required to list, accompanied with printed forms, in blank, of the statement required; and the assessor shall, at the time he delivers such notice and blank forms, demand and receive such statement, unless such person shall require further time to make out the same, in which case he shall call for the same before the third Monday of May.

UNINCORPORATED BANKS AND BANKERS.

SEC. 2758. Every company, association, or person, not incorporated under any law of this state or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit, shall be deemed a bank, banker, or bankers, within the meaning of this chapter.

SEC. 2759 (As amended April 17, 1882; 79 Ohio Laws, 109.) All unincorporated banks and bankers shall, annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First—The average amount of notes and bills receivable, discounted or purchased in the course of business, by such unincorporated bank, banker or bankers, and considered good and collectible.

Second—The average amount of accounts receivable.

Third—The average amount of cash and cash items in possession or in transit.

Fourth—The average amount of all kinds of stocks, bonds, including United States government bonds, or evidences of indebtedness, held as an investment, or in any way representing assets.

Fifth—The amount of real estate at its assessed value.

Sixth—The average amount of all deposits.

Seventh—The average amount of accounts payable, exclusive of current deposit accounts.

Eighth—The average amount of United States governernment and other securities that are exempt from taxation.

Ninth—The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth items as are by law exempt from taxation, and the remainder thus obtained added to the amount of item nine, shall be entered upon the duplicate of the county in the name of such bank, banker, or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward, or township.

INCORPORATED BANKS.

See sections 2762, 2765, 2766, supra, pp. 14 and 15.

COLLECTION OF TAXES.

See section 1036, supra, p. 19.

SEC. 1042. The auditor shall, annually, on or before the first day of October, deliver to the county treasurer a true copy or duplicate of the book containing the tax-list required to be made by him for the year.

SEC. 1087. The county treasurer shall, immediately after receiving from the auditor of his county a duplicate of the taxes assessed upon the property of such county, cause notice to be posted * * * specifying particularly in said notice, the amount of tax levied on the duplicate * * *

SEC. 1088. The treasurer's office shall be kept open for the collection of taxes, from the time of the delivery of the duplicate to him until the twenty-fifth day of January, and from the first day of April, until the twentieth day of July.

SEC. 1094. When one-half of the taxes, as aforesaid, charged against any entry, on a tax duplicate in the hands of a county treasurer, is not paid on or before the twentieth day of December next, after the same has been so charged, or when the remainder of such taxes is not paid on or before the twentieth day of June next thereafter, the county treasurer

shall proceed to collect the same by distress or otherwise, together with a penalty of five per centum on the amount of taxes so delinquent. * * *

SEC. 1038. The auditor shall, from time to time, correct all errors which he discovers in the tax-list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property, or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments; * * *

If these provisions are in conflict with section 5219 of the revised statutes of the United States, then they are also in conflict with the constitution of Ohio. Both contain the same requirement of substantial equality.

The question of the right of individuals to deduct their liabilities from their moneyed capital, under the provisions of the present constitution of Ohio, was early decided by the supreme court of Ohio.

After the adoption of the present constitution in 1851, the legislature passed the tax law of April 13, 1852, by section 10 whereof it was provided that "in making up the amount of moneys and credits which any person is required to list for himself or any other person, company or corporation, who shall be entitled to deduct from the gross amount of money and credits, the amount of all *bona fide* debts owing by such person, company or corporation to any other person, company or corporation, for a consideration received, * * * provided that nothing in this section shall be so construed as to apply to any bank, company or corporation exercising banking powers or privileges." (3 Ohio State, 10.)

The question of the constitutionality of this provision of the statute came before the supreme court of Ohio in the year 1853, in the case of *Exchange Bank* v. *Hines*, 3 Ohio State, 1, wherein the bank sought to enjoin the tax levied upon its capital because the same was greater than the burden imposed upon

individuals by reason of the allowance of a deduction of debts under the above statute; but the court held that the section referred to, "which allows individuals and certain corporations, in giving their tax lists, to deduct their liabilities from the amount of their moneys and credits, is repugnant to the constitution of Ohio, and is void. The constitution permits no deduction of liabilities from moneys and credits."

This decision has been repeatedly cited and approved by the supreme court of Ohio and has not since been questioned. Subsequent to the decision, however, the legislature of Ohio passed substantially the existing act of definitions, in which credits were defined to be, "the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by such person." (Act of April 5, 1859, Sec. 2; 56 Ohio Laws, 177.)

If, as is claimed by counsel for appellee, the effect of this definition of credits is to permit individual owners of moneyed capital to deduct therefrom the amount of their *bona fide* indebtedness, then the statute is clearly in conflict with the constitution of the state of Ohio as interpreted by the supreme court of that state. This court will not assume to give to the statute of a state an interpretation at variance with the provisions of the constitution of that state, unless such interpretation is the inevitable conclusion from the language of the statute. In the absence of any showing to the effect that such is the accepted interpretation by the authorities of the state the court will look only to the statute itself. It seems to us, therefore, that in the absence of any interpretation to that effect by

the supreme court of the state of Ohio, this court will not give to the statute in question an interpretation that would make it in conflict with the constitution of Ohio, merely for the purpose of discovering some alleged discrimination as against shares of a national bank. If a statute is capable of a construction which will permit it to stand, that construction should be given it.

The statute does not permit the deduction of indebtedness from moneyed capital. By the definition of credits as given above the legislature doubtless intended simply to provide a method of ascertaining the amount of a particular class of moneyed capital held by the individual. The statute was passed in the light of the then recent decision in *Bank* v. *Hines*. It in effect permitted him at the time of making his return for taxation to close his books and ascertain how much capital he really had invested. From the amount of moneyed capital thus ascertained there is no deduction of liabilities, but the individual is required to pay taxes on the same at its true value in money.

Unlike the case of *Evansville Bank* v. *Britton*, 105 U. S. 322, in which the subjects of taxation from which the taxpayer might deduct his indebtedness, were: "(1) credits or money at interest, either within or without the state, at par value; (2) all other demands against persons or bodies corporate, either within or without the state. Total amount of all credits," (p. 324,) the individual taxpayer of Ohio is not permitted to deduct any indebtedness from any moneyed capital when that moneyed capital shall have been ascertained. As will be seen from the statutes of Ohio, cited above, the different classes of moneyed capital mentioned in the Indiana statute are the separate subjects of taxation in Ohio, and all moneyed capital, when ascertained, is subject to taxation by the same rule.

Moreover the statute should be construed in the light of the constitution under which, and subject to which, it was enacted, and of the decisions of the court by which its provisions were to be interpreted. The constitution of Indiana did not prohibit the deduction of debts from moneyed capital, nor had the supreme court of that state declared that such deduction was unlawful. It may fairly be presumed that the legislature of Ohio did not intend to enact a law which was clearly in violation of a well understood provision of the then recent constitution, and which, in a different form, had just been declared by the highest tribunal of the state to be void.

Substantially the same provisions are found in the statutes regulating the taxation of the moneyed capital invested in banks in Ohio, national and state, incorporated and unincorporated. From the statutes cited above it will be seen that the moneyed capital of banks and bankers is ascertained by deducting from their credits their *bona fide* debts; and the shares of stock, which are simply the representatives of the moneyed capital of the bank, are therefore the representatives of the excess of the bank's credits over its debts. The moneyed capital represented by the stock has therefore been ascertained in precisely the same way as the moneyed capital of individuals.

But whether an interpretation of this statute shall be given as claimed by appellant, or as claimed by appellee, it can in neither event entitle appellee to the relief demanded in this case.

If it shall be held that the statute simply provides a means of ascertaining the amount of moneyed capital and that no deductions are allowed therefrom, (as contended by appellant,) then of course there can be no discrimination, as bank shares stand upon precisely the same footing; if it shall be held that the statute does allow the deduction of debts from moneyed capital, (as contended by appellee,) then the statute is clearly in

contravention of the constitution of Ohio and void, and cannot result in any discrimination against appellee's shareholders.

In *Bank* v. *Hines*, 3 Ohio State, 1, it was held that the statute being void, the bank had no grounds for complaint.

It should be borne in mind that there is no averment and no finding in this case that any person in Ohio has been permitted to deduct his debts from his moneyed capital. Unless this has been done the tax complained of is legal. This court will not assume that any such deductions have been made; nor will it assume that state officials have placed upon a statute of their state a construction in manifest violation of the fundamental law of that state.

III. IF THE DEDUCTION IS ALLOWED, WAS THE DEMAND THEREFOR MADE WITHIN THE PROPER TIME?

The court below found that "no demand for the deduction from the assessed value of any shares of the complainant of the amount of the *bona fide* indebtedness of any shareholders was made, either by the complainant or by any of its shareholders, until the 17th day of December, A. D. 1885, a date prior to the commencement of this action, at which time the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with law to the treasurer of said county for the collection of said taxes." (Record p. 26.)

To entitle a shareholder to a deduction of his individual indebtedness from the value of his stock, he must make the necessary affidavit and demand to the assessing officers, before the process of assessment is completed. See

Williams v. *Weaver*, 100 U. S. 547.
Hills v. *Exchange Bank*, 105 U. S. 319.
Supervisors v. *Stanley*, 105 U. S. 305.
Stanley v. *Supervisors*, 121 U. S. 535.

The only exception allowed to the rule here stated is where it is averred and proved that all affidavits and demands for deduction which could or might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation.

Nothing of this kind was claimed or shown in this case, and the fact that the demand for deduction, made on the very day complainant's bill was filed, upon an officer who had no authority to comply with the demand, was rejected, does not prove that a demand to the assessing officers would have been likewise rejected. The county treasurer has nothing whatever to do with the valuation or assessment of property, and hence a demand upon him would be useless, and at the time the demand was made the county auditor had long since ceased to have any control of the matter. Under the statutes of Ohio the duty and authority of the county auditor in respect to the appraisal of bank shares ceases when he has fixed the valuation of such shares and transmitted the same to the state board of equalization. After the state board has acted the auditor of state is required forthwith to certify to the auditors of the proper counties the valuations as equalized, which valuations shall be put upon the proper tax list. All this had been done long before the complainant or its shareholders ever claimed the deduction of the individual debts of the shareholders. Not only so, but the tax duplicate had long since been delivered to the county treasurer for collection, in pursuance of section 1042 Revised Statutes of Ohio, and it was within three days of the 20th of December, when by section 1094 Revised Statutes of Ohio, the taxes would have been delinquent and subject to a penalty of five per cent. on account of such delinquency.

The county auditor, under section 1038 Revised Statutes of Ohio, had no authority to correct the tax duplicate at the time the deductions were claimed, for that section relates to clerical errors merely. See

State ex rel. v. *Commissioners*, 31 Ohio State, 271.

Insurance Co. v. *Cappelar*, 38 id. 560.

Butler v. *Commissioners*, 39 id. 168.

The authority to correct errors in the assessment of property for taxation, other than such as are merely clerical, is by the laws of Ohio entrusted to the auditor of state, or where the amount of taxes to be remitted exceeds $100, to the governor, auditor of state and attorney general. (Section 167 Revised Statutes, as amended April 13, 1880, 77 Ohio Laws 193). But as no claim or demand was made to these officers, and as they can only act in any event after the process of assessment has been completed, it is unnecessary to inquire into the extent of their authority.

The court below, however, held that "the laws of Ohio make no provisions for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured" (Record p. 27), and accordingly that it was not necessary to make any demand of the assessing officers.

But neither did the statutes of New York, at the time the question arose there, make any express provisions for the allowance of such deductions. Yet this court held that to entitle a shareholder to a deduction of his individual indebtedness from the value of his stock he must make the necessary affidavit and demand to the assessing officers, before the process of assessment is completed.

Under the laws of Ohio the shareholder is entitled to make his deductions, if at all, at the time the property is listed for taxation; the assessing and taxing officers have nothing to do

with the matter. If the construction of the statute is as appellee contends, the shareholder would only be required to return the excess of his moneyed capital. No demand upon any one would be necessary. The taxing officer would have the right to presume that the deduction had been made before the tax list was returned. It would be simply a matter of computation, and that computation to be made by the shareholder.

If the statute permits the deduction of debts from moneyed capital the permission extends to the shareholder in a national bank by the same terms that it extends to others. There is no provision that is not equally applicable to all. In *Stanley* v. *Supervisors*, 121 U. S. 535, this court said:

"If he (the stockholder) had debts, the assessment without a deduction from them in the estimate of the taxable value of the stock was only voidable. The assessing officers, in making the assessment, were acting within their authority until duly notified of the debts which were to be deducted. In such case, therefore, the duty devolved upon the stockholder to show to the assessing officers what his debts were, and to take such steps as were required by the law to obtain a correction of the over-assessment." (p. 545.)

CONCLUSION.

Appellant therefore respectfully contends: that the first, fourth and fifth questions embodied in the certificate of division should be answered in the negative; that the second question should be answered in the affirmative; that the third question should be answered by negativing the first and affirming the second alternative; and that the decree of the Circuit Court should be reversed with such order for farther proceedings as may be appropriate.

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For Appellant.

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FRED'K L. GEDDES,
Of Counsel.

12-9-17

MOTION TO ADVANCE.

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 970.

HORATIO N. WHITBECK, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, APPELLEE.

HADDEN, DISSETTE AND COLLISTER,
JAMES LAWRENCE,
Solicitors for Appellant.

JACOB A. KOHLER,
Attorney General.
CLARENCE BROWN,
FRED'K L. GEDDES,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM 1887.

NO. 970.

Horatio N. Whitbeck, as Treasurer of Cuyahoga County, Ohio, Appellant,

vs.

The Mercantile National Bank of Cleveland, Ohio, Appellee.

MOTION TO ADVANCE.

The Appellant, Horatio N. Whitbeck, as Treasurer of Cuyahoga county, Ohio, moves this Honorable Court, that this cause be advanced upon the docket, and set down for hearing at an early day, in preference to civil causes pending in this court between private parties for the following reasons:

1. The Appellant, Horatio N. Whitbeck, as Treasurer of Cuyahoga county, Ohio, is a party claiming under the Revenue Laws of the State of Ohio, and the execution of the Revenue Laws of that State is enjoined by the Circuit Court of the United States for the Northern District of Ohio, Eastern Division:

2. The matter involved in this cause is the valuation, equalization and taxation of shares in national banks under the constitution and statutes of the State of Ohio, and the questions presented by the record are as follows:

(a) Shares in a national bank and other moneyed

capital in the hands of individual citizens of the particular municipality or county, in which the complainant bank is located, having been valued by the assessing officers of that locality at sixty (60) per centum of their true value in money, can the State Board of Equalization for incorporated banks both state and national, in equalizing the value of the shares of all incorporated banks in the state, increase the valuation of the shares of complainan, bank to sixty-five (65) per centum of their true value in money, other moneyed capital throughout the state being valued at not less than sixty-five (65) per centum of its true value in money; or

(b) Is the rule for the valuation of other moneyed capital in the hands of individual citizens of the city or county where complainant bank is located, the sole measure for the valuation of the shares of national banks located therein; or

(c) May the State Board of Equalization for the shares of incorporated banks both state and national, in the equalization of the shares of all incorporated banks in the State of Ohio, lawfully value such shares at a rate not exceeding the average rate at which other bank shares, and other moneyed capital in the hands of individual citizens of said statet throughout said state, are valued for taxation;

(d) Under the laws of the United States, and the

constitution and statutes of Ohio, may a share holder in a national bank deduct from the assessed value of his shares the amount of his *bona fide* indebtedness; and

(e) If so, was the demand for such deduction made within proper time?

3. Many other suits of the same character are pending in the Circuit Courts of the United States in the State of Ohio, in all of which interlocutory injunctions have been allowed, and all of which will be disposed of by a determination of the case at bar.

4. The statutes of Ohio provide for an annual state board for the equalization of the shares of all incorporated banks throughout the state, whose duty it is to hear complaints and equalize the value of bank shares according to the rules prescribed for valuing and equalizing the values of real and personal property. The decree in the case at bar, and the interlocutory injunctions granted in other like suits pending in Ohio, have practically annulled the provisions of the statutes of Ohio relating to the annual state board for the equalization of shares for incorporated banks, leaving the valuation of such shares to the varying judgment of the officials of eighty-eight counties, without rules for their guidance or concert of action.

5. By reason of the decree in the case at bar, and the interlocutory injunctions aforesaid, the operations of the

government of the State of Ohio, are seriously embarassed in this, that not only are the functions of the state board for the equalization of shares of incorporated banks practically suspended pending the determination of the questions involved in this cause, but there results great inequality between the valuation of shares of national banks and other moneyed capital throughout the state of Ohio.

Moreover, by reason of the decree and injunctions aforesaid, and particularly of the alleged right of shareholders to deduct from the assessed value of their shares the amount of their *bona fide* indebtedness, great uncertainty results as to the extent of the levy necessary to be made for the purposes of the government, and the amount to be realized therefrom, resulting in great embarassment in the enforcement of the revenue laws of the state not only as to shares in national banks but also as to shares in all other banks and other moneyed capital in the hands of individual citizens throughout the state.

Madden, Dissette & Collister
S. H. Foster
James Lawrence
Solicitors for Appellant.

Clarence J. Brown
Frederick L. Goddes
of Counsel.

Appellee consents to an order advancing said cause for hearing

Dec. 1, 1887

Boynton and Hale
Sols for appell

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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 970.

HORATIO N. WHITBECK, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO.

Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEE.

BOYNTON, & HALE,
SOLICITORS FOR APPELLEE.

WHITWORTH BROS., PRS., 74 FRANKFORT ST., CLEVELAND, O.

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Wm Addams, Dissette & Collister
C. H. Foster
James Sawyer
Solicitors for Appellant.

Clarence A. Brown
Frederick J. Stoddard
of Counsel.

Appellee consents to an order and hearing of said cause for hearing

Dec. 1, 1859

Payne Ten Eyck & Hale
Sols for Appellee

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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 970.

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vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO. Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEE.

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WHITWORTH BROS., PRS., 74 FRANKFORT ST., CLEVELAND, O.

Supreme Court of the United States.

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HORATIO N. WHITBECK, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO. Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The appellee is a national bank, located in the City of Cleveland, Ohio, with a capital stock of $1,000,000, divided into shares of $100 each. For the year 1885, a tax was levied for state, county and corporation purposes upon the shares of Appellee, amounting in the aggregate to $12,890.15 exclusive

of the assessed value of its real estate; more than nine-tenths of this tax was imposed for city and county purposes. The bill concedes that $8,363.40 of this tax was properly levied. One half of this latter sum, under the laws of Ohio, was due and payable on the 20th day of December, 1885; and on that day a tender was made to the Treasurer of the sum due, who refused to receive it until an order of the Court permitted him to do so without prejudice to the right to collect the balance. Such order having been made, the entire tax conceded, and found by the Circuit Court, to be due, has been paid by the bank. The amount which appellee was relieved from paying by the decree of the Circuit Court was the sum of $3,967.75.

The Bill alleges:

1st. That the tax, as assessed on the shares of this bank, is greater than that assessed on other moneyed capital in hands of individual citizens of the state, and is, therefore, in conflict with Section 5219 of the Revised Statutes of the United States.

2nd. That this increased tax imposed on the shares of the appellee is a violation of the express provision of the Constitution of the State of Ohio.

3d. That the refusal to permit the owners of shares of the appellee's stock to deduct from the value of their shares bona fide debts owing by them, and the levy of a tax on the full value of those shares, without any deduction on account of such indebtedness, are in conflict with Section 5219 of the

United States Revised Statutes. That section reads as follows:

> "Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The provisions of the Constitution of the State of Ohio relating to the subject of taxation, are as follows:

> ART. XII. Sec. 2. "Laws shall be passed, taxing (1) by a uniform rule, all moneys, credits (2) investments in bonds, stocks (3) joint stock companies, or otherwise; and also all (4) real and personal property, (5) according to its true value in money; (6) etc."

> ART. XII. Sec 3. "The General Assembly shall provide, by law, for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, (1) effects, or dues, of every description, (without deduction), (2) of all banks, now existing, or hereafter created, and of all bankers, (3) so that all property employed in banking, shall always bear a burden of taxation, equal to that imposed on the property of individuals."

> ART. XIII. Sec. 4. "The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."

By the statute of Ohio, the valuation of all personal property in each county is assessed annually by an assessor elected in each township or ward of a city and returns made to the

county auditor. A county board of equalization, composed of the county commissioner and auditor, is then charged with the duty of equalizing the value of all personal property, moneys and credits in each county, exclusive of cities of the first and second class. In these cities the duty of equalizing the value of personal property, including moneys and credits, devolves upon the city board of equalization.

The powers of these two boards are defined by Sections 2804 and 2805 of the Revised Statutes of Ohio, which for reference are here inserted in full.

SEC. 2804. "There shall be an annual county board for the equalization of the real and personal property, moneys and credits in each county, exclusive of cities of the first and second class, to be composed of the county commissioners and county auditor, who shall meet for that purpose at the auditor's office, in each county, on the Wednesday after the third Monday in May, annually. Said Board shall have the power to hear complaints and to equalize the valuation of all real and personal property, moneys and credits within the county, and shall be governed by the rules prescribed for the government of decennial county boards for the equalization of real property: provided, that said board shall not reduce the value of the real property of the county below the aggregate value thereof, as fixed by the state board of equalization, to which shall be added the value of all new entries and new structures over the value of those destroyed, as returned by the several township assessors for the current year: provided further, that except as to new structures destroyed and lands and lots brought on to the tax-list since the preceding decennial state board of equalization, the annual county board shall not increase or reduce the valuation of any real estate, except in cases of gross inequality and then only upon reasonable notice to all persons directly interested, and an opportunity for a full hearing of the question involved."

ANNUAL CITY BOARD.

SEC. 2805. "In each city of the second and third grade of the first class, and each city of the second class, there shall be an annual board for the equalization of the value of the real and personal

DECENNIAL COUNTY BOARD.

Sec. 2813. The auditor, surveyor, and commissioners of each county shall compose the county board for the equalization of the real property within their county, except that within any city of the first or second class; and they shall convene at the office of the county auditor on the Tuesday after the first Monday of September, one thousand eight hundred and eighty, and every tenth year thereafter; and each shall be sworn fairly and impartially to equalize the value of the real estate within the county that is within their jurisdiction, according to law; any three of them shall form a quorum, and the auditor shall keep a full and accurate record of the proceedings and orders of the board.

Sec. 2814. The auditor shall lay before the board the returns made by the district assessors, with the additions which he shall have made thereto; and they shall then immediately proceed to equalize such valuation, so that each tract or lot shall be entered on the tax list at its true value, and for this purpose they shall observe the following rules: 1st. They shall raise the valuation of such tracts and lots of real property as, in their opinion, have been returned below their true value to such price or sum as they may believe to be the true value thereof. 2d. They shall reduce the valuation of such tracts and lots as, in their opinion, have been returned above their true value, as compared with the average valuation of the real property of such county, having due regard to the relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot. 3d. They shall not reduce the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors, with the addition made thereto by the auditor, as hereinbefore required.

Sec. 2749. The county auditor shall, before the fifteenth of April, annually issue a call to all the assessors of his county, to meet at his office, or some other place at the county seat, within five days, for consultation, and the auditor shall meet with said assessors, and answer such questions and give such instructions as shall tend to a uniformity in the action of the assessors in his county; and the auditor shall deliver to said assessors, blank forms and instructions, or forward them to the township clerks, immediately after said meeting of assessors.
[62 v. 114, §56.]

property, moneys and credits in such city, to be composed of the county auditor and six citizens of such city, appointed by the council thereof; said board shall meet at the office of the county auditor on the fourth Monday of May, and shall close their session on or before the second Monday of July, then next following, except in cities of the third grade of the second class, the board shall close their session on or before the fourth Monday of June following. The board shall have power to equalize the value of the real and personal property, moneys and credits within such city, and shall be governed by the rules, provisions, and limitations prescribed in the next preceding section for annual county boards. The members shall each be entitled to receive the following fees for each day necessarily employed in the performance of their duties, as members of city boards of the first class, and of the first and second grades of the second class, five dollars per day, and members of city boards of the third grade of the second class, two dollars and fifty cents per day, to be paid out of the county treasury; and in each city of the first grade of the first class there shall be a like annual board, with same powers and duties, to be composed of the county auditor and six citizens of such city, to be appointed by the council, the first appointments being of two for one year, two for two years, and two for three years, and thereafter annually two shall be appointed for three years, and all vacancies shall be filled for the unexpired terms; said board shall meet at the office of the county auditor, on the fourth Monday of May, and, including the board now elected, shall close their session on or before the fourth Monday of August, and it may appoint all necessary clerks, not exceeding six; each member, except the auditor, shall receive five dollars per day, and each clerk three dollars per day, for their services for the time actually employed in the discharge thereof, which shall be paid out of the county treasury; said board shall be authorized to administer any oath which it may deem necessary to the proper discharge of its duties."

The sections of the statute under which the shares of national banks were assessed for taxation in the year 1885, are as follows:

Rev. St., Sec. 2765. "The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting in detail and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second

Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share."

Sec. 2766, as amended in 1883; 80 O. L. 54. "Upon receiving such report, the county auditor shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks, a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor.

Sec. 2808, as amended in 1883; 80 Ohio Laws, 55. "The governor, auditor of state and attorney general shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of state, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the state auditor."

Sec. 2809. "Said board shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such a per cent. as will equalize said shares to their true value in money; provided, that said board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors, by more than twenty (20) per centum."

As regards the right to deduct debts from credits:

Sec. 2737 of the Revised Statutes of Ohio, enumerates the personal property to be listed for taxation arranged in sixteen items. Of the property so to be listed for taxation, item 14 reads:

14th. "The amount of credits as hereinbefore defined."

The definition referred to is found in Sec. 2730 of the Revised Statutes of Ohio, and is as follows:

> "The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money as are hereinbefore defined, when added together over and above the sum of legal bona fide debts owing by such person."

In considering the claims made, as above stated by the original bill of complaint, the Circuit Court found (see certificate of division in printed record):

> 1. "That moneyed capital (other than that invested in shares of national banks) in the hands of individual citizens of the City of Cleveland and County of Cuyahoga, in which the complainant bank is located, was by the rule of valuation fixed by the tax officers of said county and city, valued for taxation in the year 1885 at sixty (60) per centum only of its true value in money."
>
> 2. That the auditor of Cuyahoga county, in accordance with the rule applied to other moneyed capital in the hands of individual citizens of the city and county, fixed the value of the shares of the appellee also at sixty per centum of their true value in money.
>
> 3. That the state board of equalization for banks increased said valuation of the county auditor from sixty per centum of the true value of said shares in money to sixty-five per centum of that value.
>
> 4. That the application for deductions in favor of individnal shareholders, on account of the excess of their debts over their credits, was not made until December 17, 1885, a short time before the first half of the tax was due and payable.

On the foregoing allegations of the bill, statutes and facts, there occurred on the hearing of said cause the following questions of law upon which the opinion of the judges of the Cir-

cuit Court was divided; and which are certified to this court for final determination, to wit:

1. "Whether the valuation for taxation, as aforesaid, of the shares of the complainant by the state board of equalization for the shares of incorporated banks at sixty-five per centum of their true value was a discrimination prohibited by the act of Congress."

2. "Whether certain testimony offered by said defendant and excluded by the court was admissible to show the practice throughout other counties of the state, whereby shares of stock in national banks were valued for taxation in said year at less than their true value in money."

3. "Whether the rule for the valuation of other moneyed capital in the hands of individual citizens of said city and county where said complainant bank is located was the sole measure for the valuation of the shares of national banks located therein, or might the state board of equalization for the shares of incorporated banks lawfully value such shares at a rate not exceeding the average rate at which other moneyed capital in the hands of individual citizens of said state, throughout said state, is valued for taxation."

4. Whether the taxation of national bank shares in the State of Ohio in the year 1885, without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceding the second Monday in May, 1885, or on

the day preceding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said shareholders not having deducted said *bona fide* indebtedness from any credits owned by them at either of said dates."

5. "Whether the demand for such deduction, first made on the 17th day of December, 1885, was sufficiently early to entitle complainant's shareholders thereto."

ARGUMENT.

I.

BILL OF EXCEPTIONS CANNOT BE REGARDED.

The bill of exceptions found in the record presents no question for the consideration of the court, for the reason that the testimony rejected by the Circuit Court is not set forth in the bill, but is simply referred to as "on file in the case." That the court, in such case, cannot examine the question thus sought to be raised, is settled by *Hanna vs. Maas*, 122 U. S. 24, where the court say: "The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains."

Moreover, the amount involved is less than the sum required to give this court jurisdiction on appeal. Hence the court can consider only the questions stated in the certificate of division by the judges before whom the case was heard in the circuit court.

It is also submitted that the certificate of division presents no question that the court can answer. It will be seen from the record, pages 22 and 23, that this cause with seven others, which involved similar questions, was tried at the October term, 1886, of the circuit court, and a decree rendered in each of the cases, restraining the treasurer from the collection of the illegal taxes.

On the 31st of January, being a day in the October term, an entry was make in the following words and figures:

Made at Chambers, without notice

"ORDER VACATING DECREE,

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

The Mercantile National Bank of Cleveland,
vs.
Horatio N. Whitbeck, Treas. } No. 4411.

The above entitled cause having been submitted to the court, and a decree having been entered in said cause in favor of the complainant therein, and the defendant desiring to present the questions, arising in said cause to the supreme court of

the United States to be finally decided, and for that purpose intending to appeal said cause, numbered 4411, on motion of said defendant, it is now ordered by the said court that the decrees hereinbefore entered in the above entitled causes, numbered 4411, 4412, 4413, 4414, 4415, 4416, 4417 and 4418, be, and the same hereby are, set aside and vacated to await the further order of the court, and that the said several complainants have leave to apply at any time hereafter to have said decrees re-entered.

Approved. HOWELL E. JACKSON,
Circuit Judge."

It is apparent from this entry that the vacation was made expressly for the purpose of enabling the judges to certify a question of which they were not, in fact, divided in opinion, but which certificate was necessary to give jurisdiction to decide a question which counsel for appellant desired presented to this court.

See *Railroad Co.* vs. *White*, 101 U. S., 98.

Nothing further was done in the matter until the April term of the court, at which term the bill of exceptions was taken and signed, found on page 24 of the record; the re-entry of judgment made, found on page 25 of the record; and the certificate of division drawn up and signed, found on pages 26, 27 and 28 of the record.

The entire trial of the court was had at the October term,

at which term no bill of exceptions was taken, and no certificate of division even suggested.

In view of these facts, it is respectfully submitted, that this court acquires no jurisdiction to answer the questions propounded by the certificate of division. The certificate should have been made at the term of the court at which the trial was had.

Sec. 650 of the Revised Statutes of the United States requires the points to be stated and certified during the term at which the judges *so disagreed*, which as here claimed was during the trial. Nothing of the kind was done, and without this there is no jurisdiction to entertain the appeal.

II.

WHAT IS DISCRIMINATION.

The first question submitted to the court by the certificate is, whether the valuation for taxation, as aforesaid, of shares of the complainant by the state board of equalization for shares of incorporated banks at sixty-five per centum of their true value was a discrimination prohibited by the act of Congress, other moneyed capital having been assessed at sixty per cent. only of its true value. To state the question in other language, giving it direct application to this case, it is this:

Does the act of Congress sanction the taxation of $495,754.76 of money invested in national bank shares as often, and

at the same rate on the dollar, as $444,800 invested in other similar ways, are taxed? Or, in other words, does it permit the state purposely to call $60,000 invested in national bank shares $65,000 for the purpose of taxation, when other moneyed capital goes in at its nominal amount?

Take an example: A invests $100,000 in national bank shares and $100,000 in other moneyed investments; on the former he is taxed on a valuation of $65,000, and on the latter at a valuation of $60,000, making a difference in the tax, at the rate of 26 mills on the dollar, of $130. Notwithstanding this difference it is gravely contended that there is no discrimination between the two investments as respects their taxation. To deny that this is discrimination is to assert that things that differ essentially are one and the same thing. As well may it be contended that a statute requiring bank shares to be taxed at the rate of 26 mills on the dollar's valuation where other moneyed capital is taxed at 24, makes no discrimination against the bank shares; and were such difference in the rate made, and substituted for the increased valuation here, the shares in the present case would be the gainer, as the tax on the increase of valuation amounts to more than 2 mills on the dollar of their true value.

In the facts found upon which the question of law is certified, the comparison is made directly between the valuation of "other moneyed capital in the hands of individual citizens of the state" and shares of national banks. The "moneyed cap-

ital" specified in the finding of facts is "the moneyed capital" defined by the act of Congress.

The difference in the valuation is not only a plain and substantial one, but it was intentionally and advisedly made. It was not a difference arising from error of judgment, nor from difference of opinion as to values, nor from any difficulty in administering the law; it was "a designed and manifest departure from the rule" fixed by the statute,—*Stanley vs. Supervisors*, 121 U. S., 550,—a difference fixed with the avowed intention to increase the valuation of this class of property beyond that of other moneyed capital similarly invested. After deducting the value of the real estate owned by this bank, the county auditor fixed the aggregate value of the shares of the appellee at $444,820.00. The county auditor was a member of the county board of equalization; he knew of the sixty per centum rule applied to the valuation of other moneyed capital; indeed, he participated in making and in applying that rule to the valuation of all other moneyed property; and following that rule, as the facts show, he fixed the value of the shares of this bank at the aggregate sum given above. The state board of equalization, with full knowledge of the rule adopted in Cuyahoga county, and in plain violation of the statute prescribing the rules to govern its action, as will hereinafter appear, and without any attempt to equalize the shares with other "moneyed capital," added to this valuation made by the county auditor, the sum of $50,954.76, being more than eleven (11) per centum of that sum, and increasing the tax to be paid, nearly $1,700. It is true that the

same percentage or rate was levied on the valuation of the two classes of moneyed capital, as finally fixed. The cause of our complaint, however, was and is the unequal valuation caused by the addition made by the state board, which is as much a violation of the statute as if the valuation remained unchanged and the percentage or rate of taxation had been purposely fixed at a higher figure. As repeatedly held by this court, the "rate of taxation" involves both the valuation placed on the property and the percentage of assessment on that valuation.

People vs. Weaver, 100 U. S., 539.
Pelton vs. National Bank, 101 U. S., 143.
Stanley vs. Supervisors of Albany, 121 U. S., 542.

In the *Pelton* case, the principle of which is reaffirmed in the other cases cited, the court said: "It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owners of the shares of the national bank a larger sum, in proportion to their actual value, than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of congress."

Boyer vs. Boyer, 113 U. S., 694.

That is precisely what was done in the present case, and what was intended to be done, by the state board of equalization, notwithstanding this authoritative denial of the power so to do.

III.

THE TAXING DISTRICT.

It will be claimed as the comparison is not made between the assessed value of the shares of the appellee and that of all other moneyed capital "throughout the state," that, therefore, the court cannot say that there has been a discrimination prohibited by the act of congress. It conclusively appears, however, by the facts found, that the shares of the appellee are valued for taxation proportionately higher than other moneyed capital in the city and county where the bank is located, which it is submitted is the true test of discrimination.

This is the point sought to be raised by the second question in the certificate of division,—which is, "whether the said testimony offered by said defendant and excluded by the court, was admissible for the purpose stated," as well as by the third question, which is: "Whether the rule for the valuation of taxation of other moneyed capital in the hands of individual citizens of said city and connty, where said bank is located, was the sole measure for the valuation of the shares of national banks located therein, or might the state board of equalization for the shares of incorporated banks lawfully value such shares at a rate not exceeding the average rate at which other moneyed capital in the hands of individual citizens *throughout* said state is valued for taxation." Whether a certificate of division can be employed to perform the office of a bill of exceptions by bringing before the court the ruling made during the progress of

the trial on the admissibility of testimony, is a question we beg to submit for the court's consideration. If it may be considered the sufficiency of the testimony offered to prove the fact must be assumed, as it was not shown. But if the question may be considered, then in the light of both the federal and state statutes, there is little difficulty in finding a correct answer thereto.

In the first place, Section 5219, of the Revised Statutes of United States, in one of it srestrictions, especially provides that shares in national banks owned by non-residents shall be taxed in the city or town where the bank is located and not elsewhere. Why so? Obviously, to enable the non-resident shareholder to know something of the burden of taxation that he is to share, in common with domestic owners. He makes his choice of localities and submits to the burden that it enforces on the moneyed capital in that locality; on the "other moneyed capital" in the taxing district where the bank is located, knowing that any comparison of assessed valuations can only be with such moneyed capital. And the same rule must prevail as to domestic shareholders, for it is not possible that congress intended to provide a different rule of valuation, or a different rule of assessment, especially a more favorable one, for non-resident shareholders than for resident ones.

Another reason equally as forcible why the county or city where the bank is located constitutes the taxing district, is that, if not so, national banks are placed at a great disadvantage in their competition with individuals engaged in similar busi-

ness in the town or city where the bank is located. Such individuals pay their taxes on the local valuation ascertained by the rule fixed for that locality, and unless the shareholders in national banks have the same right, the very discrimination the act of Congress attempts to provide against is created. So said this court in effect in the *Mercantile National Bank of New York vs. State of New York*, 121 U. S., 138-155. Speaking through Mr. Justice Matthews, the court says: "A tax upon the money of individuals invested in the form of shares of stock in national banks would diminish their value as an investment and drive capital from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from equal burdens; the main purpose, therefore, of Congress in fixing the limits of state taxation on investments in shares of national banks, is to render it impossible for the state in levying a tax to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business, and operations and investments of like character. The language of the act of Congress is to be read in the light of this policy."

It goes without saying that the complainant is brought into direct competition in the City of Cleveland with a vast amount of moneyed capital in the hands of individuals and unincorporated banking institutions seeking and making similar investments, whose moneyed capital has the benefit of the local or sixty per cent. valuation.

To give these individuals and private banks the advantage which the discrimination contended for would afford them, would manifestly and undoubtedly create and foster an unequal and unfavorable competition, which in the language of the court it was the main purpose of Congress by its legislation "to render impossible." No length of reasoning or argument can make this proposition plainer; its mere statement secures at once the assent of the mind to its force and correctness. We therefore confidently submit, that this restriction in the act of Congress has no other meaning than the one suggested, and confines, *proprio vigore*, both the rate and valuation to the town or city where the bank is located.

But secondly, the laws of Ohio very plainly create the taxing district and limit its boundary as to personal property, at least, by county lines. Section 2762 of the Revised Statutes of Ohio declare "that all the shares of the stockholders in any incorporated bank, or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or the United States, shall be listed * * * and taxed in the city, ward or village where such bank is located, and not elsewhere." The reason of this provision is perfectly obvious. The burdens imposed are to be those of the locality where the banking is done and its advantages derived. Again, the section defining the duties of the state board of equalization of the shares of incorporated banks, Section 2809 expressly requires the equalization of values to be made "according to the rules prescribed" by the statute

"for valuing and equalizing the values of real and personal property." These rules are found by tracing the statutes to be embodied in section 2814. Section 2804 provides, "That the county board of equalization in its equalization of the values of all real and personal property, 'moneys and credits,' *within the county*, shall be governed by the rules prescribed for the government of decennial county boards for the equalization of *real property*." By section 2805, the annual city board in cities of the second grade of the first class (embracing Cleveland) is created, and its duties defined. This board is given power to equalize the value of the real and personal property, "moneys and credits," *within such city*, and is required to be governed by the rules, provisions, and limitations prescribed in the next preceding section for the government of annual county boards. That is, the city board is governed by the same rules as the county board, and the county board by the same rules as the decennial county board. The rules for the government of the decennial county board are prescribed in section 2814, which reads as follows: "The auditor shall lay before the board the returns made by the district assessors, with the additions which he shall have made thereto; and they shall then immediately proceed to equalize such valuation, so that each tract or lot shall be entered on the tax list at its true value, and for this purpose they shall observe the following rules: 1st. They shall raise the valuation of such tracts and lots of real property as, in their opinion, have been returned below their true value, to such price or sum as they may believe to be the true value

thereof; agreeably to the rules prescribed by this title for the valuation thereof; 2nd, they shall reduce the valuation of such tracts and lots as, in their opinion, have been returned above their true value, *as compared with the average valuation of the real property of such county*, having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot; 3d, they shall not reduce the aggregate value of the real property *of the county* below the aggregate value *thereof*, as returned by the assessors, with the addition made *thereto* by the auditor, as hereinbefore required.

These rules, in terms, relate wholly to real estate, but the principle adopted, is by the foregoing provisions expressly required to be applied to all personal property; they require a comparison of values to be made with other real property *of the county*. By sections 2804 and 5, "all personal property, moneys and credits," are to be equalized by the rules prescribed by section 2814 for real estate; and those rules clearly limit the comparison of values to property *within the county*. Hence, the power in the state board of equalization of shares of incorporated banks, conferred by section 2809, to equalize said shares to their true value in money, *according to said rules*, limited the equalization to values attained by comparison with values placed upon other property of the county or city where the bank is located; thus conforming to the restriction of the act of Congress. That the county is a taxing district, becomes even

more apparent as we examine other sections of the statute, Section 2806, among other things, provides "That the county auditor shall lay before each of the above named boards" (to-wit: county boards and city boards) '*for the territory they respectively have jurisdiction over*,' the returns, etc., of the assessors for the current year." This is done with a view to the equalization provided for by the statute; and the equalization required to be made by these two boards, is on the property in the territory they respectively *have jurisdiction over* and none other. Neither board has the slightest power to overstep the territorial limit. Nowhere in the statute can a word be found giving to a county or city board the right to inquire into valuations beyond their respective jurisdictions; and nowhere in the statute is the least means provided for the ascertainment of the valuation given to personal property of any other county. Jurisdiction is bounded by county lines; and all equalization of property, both real and personal, is to be had by the rule that fixes "the average valuation of real estate *of the county*" as the standard of comparison. See section 2814, above quoted.

To repeat or restate the argument, derived from the Ohio Statutes, the state board of equalization of shares of incorporated banks is to be governed by the rules prescribed by the statute for real and personal property. Those rules confine the process of equalization of valuations by comparison, to the county or city where the tax is laid and to be paid. That

this is, and should be the governing rule, appears from other considerations now to be considered.

Taxes are assessed for state, county and municipal purposes. The revenues raised are divided into three funds, one to be expended in the city, another in the county, and the third in the state. All are *levied within the county* by the local officers. If a larger proportion of either of these funds is raised by an assessment on national bank shares, than the true value of those shares bears to the true value of other moneyed capital, it clearly is a discrimination against the banks. Any system of taxation, by which bank shares are required to contribute to the public revenues of either the state, county or city, more than other moneyed capital of equal value, is forbidden by the act of Congress. The entire object of the limitations expressed in that act is to prevent unequal burdens being imposed on bank shares, as compared with other moneyed capital.

The moneyed capital in other counties of the state does not contribute to two of these funds at all. As to the city fund of Cleveland, and the county fund of Cuyahoga, property of other counties bears none of its burdens. No possible comparison can be made between the value of shares of national banks located in the city of Cleveland and moneyed capital in other counties. No machinery is provided for such comparison, if one would be of any use. There is nothing in common between the two. The assessments are made for different public purposes, and the percentage of assessment is different in every county of the state. If it so happens that moneyed

capital in Hamilton county is valued at seventy-five per centum of its true value, and bank shares by the same rule, each bears an equal burden. If it were true that in some other counties of the state moneyed capital was valued at eighty per centum of its true value, would the discrimination against this bank under the facts found by the circuit court be any less? Suppose that in some one, or in a half dozen counties of the state moneyed capital was valued at forty per centum of its true value by a rule of valuation there adopted, would that circumstance lay any foundation for complaint by a bank located in the city of Cleveland that the shares were overtaxed because their valuation was increased? Could the bank obtain an injunction and relief from the payment of any part of a tax levied on its shares on any such ground? If, for the purpose of establishing equality of taxation, such a comparison with property out of the county can be invoked, it can with equal propriety be made by the foreign bank to establish inequality. It has been found as one of the facts of this case that in eleven other counties of the state the same rule of valuation prevails as in Cuyahoga County. Shall we be permitted to establish a case of discrimination by making a comparison with the rate in any or all of those counties? Most certainly not. Neither to sustain nor to invalidate a tax can such a comparison be made.

The whole scope and purpose of the assessment must be considered; the revenue to be raised, the valuation of the property to be taxed, and the percentage of the assessment are all

necessary elements to be considered in determining whether there has been a discrimination or not. Neither of these elements is the same in any two counties of the state.

Let us note the process of raising the necessary revenue to defray the public expenses. First the amount required is determined; the state auditor certifies to the county auditor the per centum required by the legislature to be levied for state purposes. The various local officers of the county, city, and township, charged with such duty, determine the amount to be raised for all other uses defined by the statute. When this is done the taxable value of the property on the duplicate is examined and the rate of taxes necessarily fixed by reference thereto. If a county has a high valuation the rate is lower, if a low valuation the rate is higher. It makes no difference to the taxpayer whether he pays one mill on two dollars or two mills on one dollar; but after the valuation is determined, the principle of local equality being observed, and the rate is fixed with reference to such valuation, to increase the valuation with no change of the rate, and no change in the amount required to be raised, necessarily creates inequality and increases the burden imposed on him, the valuation of whose property is thus increased. This inequality cannot be avoided unless the rate is lessened.

No equalization of the value of bank shares with valuations in other counties can possibly be made that does not involve a consideration at the same time of the rate or percentage to be paid thereon, and to consider the rate was not per-

mitted to the state board of equalization. Equality is only attained when both the valuation and the percentage of assessment are uniform. Suppose moneyed capital in other counties of the state to be valued for taxation higher than the shares of the appellee, but that the percentage of assessment is consequently made less. If the valuation of its shares is increased to correspond with the valuation in the other counties and the rate is not diminished, as it is not, the two species of properties are not taxed at the same rate within the meaning of the act of Congress. Changing either the valuation or the rate of assessment destroys the equality. A high valuation in a county necessarily diminishes the rate as compared with that of a county having a low valuation. Attempt to make an adjustment throughout the whole state under the present statutes and note the result. The state board of equalization for shares of incorporated banks, adopts a uniform rule for the valuation of national bank shares throughout the state, and fixes the value according to that rule. They equalize the banks with themselves only, while the limitation is not that national bank shares shall not be taxed at a higher rate than other bank shares, but that they shall not be taxed at a greater rate than is assessed upon *other moneyed capital* in the hands of individual citizens of the state. The other moneyed capital is valued by eighty-eight different equalizing boards for the counties, and by a large number of city boards, each acting independently of the other, and there is no means of adjusting values between them. Valuation put on moneyed capital will vary in every county of the state,

and show a marked want of uniformity, while bank shares are forced into the same value in all the counties by the state board of equalization. The percentage of assessment is fixed by every county and municipality in the state, each differing from the others, and, of course, dependant upon valuation. Compare the taxation on bank shares as valued by the state board, with that on other moneyed capital, and if there is found to be equality in a single taxing district in the state, between the taxation of bank shares and other moneyed capital, it is purely accidental. We are thus forced to compare the valuation of bank shares, uniform throughout the whole state, with the valuation put upon other moneyed capital, differing in each county of the state. Some one county might be found in which bank shares and other moneyed capital were accidentally valued for taxation by the same rule. Of course the same percentage of assessment would be applied to the two; but if we should by chance find another county in which the same valuation was made, there would be a different percentage of assessment. So, as the legislation now stands, under the interpretation of the state board of equalization, there is not a possibility that uniformity can be attained in more than one county, unless by accident.

The precise point under discussion was passed upon by Judges Hammond and Welker in *Bank vs. Treasurer*, 25 Fed. Rep., 759. Judge Hammond announcing the opinion said: "Under the Ohio system the state is not the unit of territorial locality for the valuation of all 'moneyed capital' in the hands

of individual citizens of that state. It is the unit for the real estate and for incorporated banks; but for that vast field of investment for 'moneyed capital' not employed by incorporated banks, the counties and cities are the units of locality, and it is there that equalization takes place and not throughout the state."

This court had occasion to consider the effect of such legislation upon the assessment of shares of national banks in the two cases arising in this state.

Pelton Treas. vs. Commercial National Bank of Cleveland, 101 U. S., page 143.

Cummings vs. Merchants National Bank of Toledo, 101 U. S., page 155.

While the court declined to hold the statute then in force under which bank shares were assessed for taxation to be in conflict with the constitution of the state of Ohio, it was held that the rule of unequal valuation adopted under this legislation was in conflict with that constitution, and a violation of the limitation imposed by Section 5219 of the Revised Statutes of the United States. In both of these cases, the methods provided by the legislature of the state for the valuation of the shares in national banks was criticised and condemned by the court.

The statute under which assessments were made in those cases was similar in all respects to the one under which the assessment was made on the shares of the appellee. As to all questions here involved, the legal effect of the two is precisely

the same. The statute was the same in effect; the rule of valuation adopted by the taxing officers the same; moneyed capital, other than bank shares, was valued precisely by the same rule, 60 per centum of its true value in money; and the comparison was made with other moneyed capital and property within the taxing district, that is, within the county, as in this case.

The result was a discrimination against the banks, similar to the one in this case, differing only in extent.

Prior to April 12th, 1876, all personal property, including shares of banks, was valued in Ohio by the same methods and rules; shares were valued as other personal property and equalized with all other property within the taxing district; but at that date, by an act of the General Assembly, bank shares were separated from other personal property within the taxing district, the class to which they belong, and put under the manipulation of a state board of equalization. That legislation continued in force until the determination of the cases cited above by this court, and immediately thereafter, the statute relating to the equalizing of shares of banks, on the recommendation of the governor of the state, was repealed and the old methods restored, in order to conform to that decision.

In 1883, with full knowledge of the effect of the statute of 1876 in creating a discrimination against the banks, and that such legislation had been condemned by this court, another statute was passed, creating another state board for the equalizing of shares of incorporated banks, which seems to have re-

stored the condemned methods, either in ignorance or in wilful disregard of the principles thus settled.

The 60 per cent. rule was deliberately adopted and steadily adhered to by the county board and the city board, and all mortgages, credits, and investments of every kind, except bank shares, were valued and assessed in accordance with that rule. The fact will bear repeating, that there are no means whatever provided whereby the valuation of personal property in one county or city can be compared with, or regulated by, the valuation assessed on the same class of property in other cities and counties. As to personal property of every kind, the equalization and the means therefor provided, stop with the county or city board of equalization, whose determination is final.

Knowing all these facts, the state board for equalizing shares of incorporated banks, designedly added to the valuation thus fixed by the county auditor, which is found for all purposes of the case to be a full and true valuation, and deliberately and knowingly created the discrimination complained of.

IV.

DEDUCTION OF BONA FIDE DEBTS.

The fourth question submitted is: "Whether the taxation of national bank shares in the state of Ohio in the year 1885 without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness ex-

isting on the Wednesday next preceding the second Monday in May, 1885, or on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the act of congress, the said shareholders not having deducted said *bona fide* indebtedness from any credits owned by them at either of said dates." That this is a discrimination forbidden, has been held by this court in every case where the question was made.

As shown by the statutes given above, credits are required to be listed for taxation, but the term "credits" is defined to be the excess of the sums of all legal claims and demands over and above the sum of legal, *bona fide*, debts owing by the person required to list such property.

No one will deny that "*credits*" as here defined are moneyed capital, and that citizens owning such capital is required to list for taxation only the excess of the debts due him over his indebtedness; that is, the value of the moneyed capital invested by the individual citizen may be diminished by a sum equal to the indebtedness owing by him, and the tax is to be assessed only on the excess.

Bank shares are legitimate "credits" under the statute, and the refusal of the taxing officers to allow the shareholders of the appellee bank to deduct their just debts from the assessed value of their stock is a discrimination against them forbidden by an act of Congress."

This holding was distinctly made by this court in *Evansville Bank* vs. *Britton*, 105 U. S., 322, where the court speak-

ing, Mr. Justice Miller, says, that "the taxation of national bank shares by the statute of Indiana, without permitting the owner thereof to deduct from their assessed value the amount of his *bona fide* indebtedness, as he may in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.

The statutes of Indiana there passed upon contained the same definition of credits that is found in the Ohio statute, and the decision in that case is in every regard applicable here. The principle of that decision has been recognized and affirmed by repeated judgments of the court.

People vs. *Weaver*, 100 U. S., 529.
Cummings vs. *National Bank*, 101 U. S., 153.
Supervisors vs. *Stanley*, 105 U. S., 305.
Mercantile Bank vs. *New York*, 121 U. S., 152-157.
Stanley vs. *Supervisors*, 121 U. S., 543.

Adverting to the point, in *Mercantile Bank* vs. *New York*, *supra*, the court at page 151 says: "In *People* vs. *Weaver*, 100 U. S., 539, it was held that the prohibition against the taxation of national bank shares at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens could not be evaded by the assessment of equal rates of taxation upon unequal valuations, and that consequently where the state statute authorized individuals to deduct the amount of debts owing by them from the assessed value of their personal property and moneyed capital subject to taxa-

tion, the owners of shares of national banks were entitled to the same deduction."

The question so conclusively settled by such weight of authority ought to be regarded as not open to further discussion.

V.

WHEN MAY DEMAND BE MADE.

The last question stated in the certificate of division is "Whether the demand for such deduction first made on the 17th day of December 1885, was sufficiently early to entitle complainant's shareholders thereto."

This question is definitely disposed of by the finding of fact made by the circuit court that the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock and provide no means by which such deduction can be secured.

The statute provides no remedy against the threatened discrimination, whether demand was made at one time or another. Such being the case the demand was clearly in time within the principles decided in *Supervisor* vs. *Stanley*, 105 U. S. 318, and *Hill* vs. *Exchange Bank*, 105 U. S. 319.

VI.

RESTRICTION IN SECTION 5209 IN HARMONY WITH OHIO CASES.

The limitation imposed by the act of Congress is in entire harmony with the constitution of Ohio. By the provisions of that instrument it is clearly intended to provide and lay a general foundation for a system of taxation by which property of every kind should contribute to the payment of taxes levied for state, county and municipal purposes, equal with all other property, according to its true value in money without reference to its class or ownership.

Equality in the burdens of taxation upon all kinds and classes of property is the express requirement of the constitution; as by the act of Congress equality of bank shares in burden of taxation imposed on "other moneyed capital," is the object to be attained. By the rule of the constitution all moneyed capital is to be taxed by a uniform rule, and so by the act of Congress national bank shares are to be taxed by the same rule.

But one interpretation has been given to these requirements of the constitution, and that has steadily been adhered to from the earliest history of the state, both in practice and by the courts.

Soon after the adoption of the present constitution, the supreme court of Ohio, in considering the provisions of that in-

strument in relation to taxation, said: "That taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation, Uniformity in taxing implies equality ~~on the~~ burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. But this is not all. The uniformity shall be co-extensive with the territory to which it applies. If a state tax, it must be uniform all over the state; if a county, town or city tax, it must be uniform throughout the territory to which it is applicable; but the uniformity as a rule required by the constitution, does not stop here; it must be extended to all property subject to taxation, so that all property must be taxed alike equally, which is taxing by uniform rule."

Exchange Bank of Columbus vs. *Hines*, 3 O. St. 15.

This construction of the provisions of the constitution by the supreme court of Ohio, was followed and approved by this court in the cases of *Cummings* vs. *National Bank*, 101 U. S. 153.

Pelton vs. *National Bank*, 101 U. S. 143. (Cited above).

These rules announced by the supreme court of Ohio, followed and applied to the facts of this case by this court, can lead to but one conclusion; there must be uniformity within the taxing district. The rate of assessment upon moneyed capital imposed by state, city, or county, must be uniform throughout the territory to which it is applicable.

By the constitution of the state, the requirement of uniformity is extended to all property subject to taxation; by the act of congress "to moneyed capital" only; but to the extent required by that act its uniformity is the same.

APPELLANT'S BRIEF.

Since writing the foregoing portions of this brief, we have been presented with a copy of the complainant's brief, to certain claims of which we reply.

It is said in support of the claim that it was not the intention of Congress to make the state at large the taxing district, that "by a well recognized rule of construction the restriction of the rate of taxation to that which is imposed upon a specified class of property in the hands of certain citizens of the state precludes the theory that it is a restriction to the rule imposed in each particular municipality and county of the state." On the contrary, we contend that it must have been, and clearly was, within the knowledge of every member of the national legislature that taxation in all the states necessarily varied in the valuation assessed, and the rate imposed in various taxing districts throughout the states. Hence, the rule prescribed by the act of Congress was made in view of this fact. In large and thickly populated cities taxes are levied for purposes entirely unknown to the rural districts, and such taxation is necessarily high. A very small amount of the taxes necessary to meet the public burden is

raised for state purposes; the great burdens are local and the sums raised are by local and municipal assessments.

Under the constitution of Ohio the legislature may create a taxing district without regard to the political or municipal subdivisions of the state. This was so held in *Bowles* vs. *The State*, 37 O. S. 35:

"The legislature in the exercise of the general power of taxation, as distinguished from the power of local assessment, may create a special taxing district without regard to municipal or political subdivisions of the state, and may levy a tax upon all property within such district, by a uniform rule, according to its true value in money, for the purpose of defraying the expenses of constructing and maintaining public roads therein."

In this case the court upheld a statute that created a special district which bore the burden of special taxation imposed upon it. Very many of these extraordinary burdens are laid in cities, and, if the capital invested in national bank shares is subject to an increase of valuation and a consequent increase of taxation to meet these extraordinary burdens, from which other moneyed capital having like investment and use in the same locality is exempt, a discrimination necessarily results.

Again, discrimination against national bank shares necessarily results from the increase of the valuation in the present case, from this fact. *There is not the slightest provision of law in Ohio* made to enable the state board of equalization for shares of national banks to know what "other moneyed capital" is valued at in the various counties or cities of the

state. The board is required "to examine the returns of said *banks* to the county auditors," and to "hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the value of real and personal property." But no where is there the slightest means of information provided for determining the valuation for taxation of the moneyed capital in the eighty-eight counties of the state. The examination of the returns, the hearing of complaints necessarily local, and an equalization by local comparison is all, if not more, than can be realized under the laws of Ohio. But, unless as before stated, the comparison of the assessed value of bank shares is made with the valuation of other similar moneyed investments of the municipal taxing district, persons or associations engaged in making the latter could drive the moneyed capital in bank shares from its employment, a result which this court has just said it "was one of the main purposes of the act of Congress in fixing limits to state taxation on the investments in shares of national banks to render impossible." Many other considerations support the view that the comparison of values is to be local. "In the listing of personal property, it shall be valued at the usual selling price thereof at the time of listing, and at the place *where the same may be*." Sec. 2739. The selling price at the locality and not in a remote part of the state is the one to be taken. There are over two thousand assessing districts in Ohio, each having its local value for

property, and that value is by statute made the basis for taxation of such property.

Again, all equalization of such values is expressly confined to the city and county boards with no means of comparing values with those of even adjoining counties, or neighboring cities.

Another claim made by the appellants is that we do not contend that in the actions of the state board of equalization there "was any intention or design to discriminate against shares in national banking associations, except as the same may be presumed from the results of the equalization." This claim is not a little remarkable in view of the charge in the bill, the proof at the trial, and the finding of the court. The bill charges that this discrimination was knowingly and designedly made: "*that the state board of equalization knowingly and designedly did fix* a much higher per cent. of value and assessment for taxation upon the capital stock and shares of your orator than was assessed upon other banks and upon other moneyed capital in the hands of individual citizens of the state" and "of said county and city."

And this allegation, with all others of the bill, is expressly found by the decree to be true. This ought to dispose of the question of the state board's knowledge and purpose, but the facts stated as the foundation for the question stated in the certificate clearly imply the same thing.

Counsel also state that "the present statute in effect,

authorizes the state board of equalization of bank shares to make a new appraisal or valuation according to rules prescribed for valuing and equalizing the values of real and personal property *throughout the state.*" How empty this statute is, and the claim under it, when what we have repeatedly said is borne in mind, that the state board cannot obtain from any statute, report or investigation authorized to be examined or made, any information whatever of the values put upon other personal property of any kind? How, then, can it value the shares by any reference to values fixed upon other personal property? But this claim for the effect of the statute is quite inconsistent with the one later made in the appellant's brief, namely, that the function of that board is to equalize the valuation of the shares as *among themselves*, according to rules for equalizing. This admission discloses the exact fact, and right here lies the whole vice of the appellant's claim. The valuation of the shares by the state board was made wholly from comparison of the "copy of the report of the cashier to the auditor" and "the auditor's valuation," without the least regard to the valuation of any other moneyed capital. It was upon this report and valuation, and upon nothing else, that the pretended equalization was made. The state board neither had the means, nor were they required by any law of Ohio in their proceeding to equalization to regard anything but such report of the cashier and the county auditor's valuation. And judging from their action it would seem to be perfectly obvious that they were utterly oblivious to the fact that the

act of Congress cut any figure in the process of equalization or imposed by its restrictions any duties upon them.

Again, the appellant says in its brief that "the truth is that under the laws of the state, the city, the county, the township, the municipal corporation, the school district and other municipalities and localities are taxing districts," hence it is claimed that if comparison between national bank shares and other moneyed capital must be limited to the particular taxing district, it must be limited to the varying territory, according as the tax varies, if a city, to a city; if a county, to a county; and if a school district, to such district, and so on. This course of reasoning utterly ignores the fact that all valuations primarily fixed in the small districts are equalized and brought to the same standard in Ohio by the city and county boards of equalization, so that for the purpose of ascertaining whether the shares of national banking associations are valued beyond the restrictions found in the act authorizing their taxation, it is only required to compare their assessed value with the standard of valuation fixed by the city or county board for investments of a similar nature. Subordinate political divisions such as townships, hamlets and school districts throughout the county all have the same valuation of personal property, and taxes are paid on the same after the equalization takes place by the supervising action of the boards of equalization. But, further than this, if the argument is good for anything, it proves too much. If you are not confined to the district over which the board for the equalization of the value of personal

property has authority to act, what district are you confined to? It appears from the bill and is by the decree found to be true, that not over one-tenth of the fund raised by taxation is raised for state purposes, and even this is raised on *the valuation of personal property* determined and fixed *in the county*, and the valuation for the taxation of which is equalized with other property *in the county*. Is it not then clear that by the act of Congress the bank shares are to have the same valuation, and that the district where the equalization takes place is the one wherein and by the comparison with whose values, the shares are to be valued?

Any attempt by the board of equalization to assess national bank shares at an average rate with all moneyed capital throughout the state is not only impossible because no means are provided to ascertain what that average is, but to take such average as the standard of comparison with *no power to consider the rate in the various localities* would necessarily result in producing the very inequality so clearly provided against by the act of Congress.

Take an example; Suppose all the property in Cincinnati to be valued at eighty per cent. of its cash value for taxation, and that to raise the required amount of taxes to satisfy the public requirements on such valuation 25 mills on the dollar is sufficient; if the valuation was reduced to sixty per cent, of the cash value of the property, or twenty-five per cent.

less, to raise the same amount of money, the rate required would be thirty-three and one-third per cent. on the dollar. In the city of Cleveland the valuation is sixty per cent. on the dollar of the true value and the rate is fixed accordingly. To increase the valuation to that fixed for Cincinnati, leaving the rate the same, would work not only great inequality, but the grossest injustice. The case would not be different had the state board of equalization power to equalize *rates* instead of *valuations*, and did they undertake under that power to fix a rate for banks by a *fair average* of those throughout the state. Hence, if it were possible for the state board of equalization for shares of incorporated banks to place such value on all the shares of incorporated banks as would be a fair average of the value fixed on other moneyed capital, with no change of rate or power to change, or power to inquire into the rate, it would incontrovertibly result in producing inequality and an increase of burdens as respects every bank situated in a locality where the assessed valuation was below such average. A moment's reflection will show this proposition to be necessarily true. It follows therefore that the shares of the appellee were overvalued by reason of the refusal of the state board to recognize and adhere to the rule adopted for the valuation of moneyed capital in the city where the bank was located, and by reason of such overvaluation it was required to pay a larger share of the taxes levied for all purposes, than that imposed on other moneyed capital, in direct disregard and violation of rights secured to it by the act of Congress.